lists of all the criteria which the Department would find meet the statutory test in the event of an investigation.

The Department also wishes to specifically caution against recruitment practices and selection criteria or practices which have the effect of discriminating against U.S. workers or other groups of workers, as the comment by Miano recognizes. In this connection, workers are advised that the three federal agencies ordinarily recognized as responsible for enforcement of anti-discrimination laws are the Equal Employment Opportunity Commission (EEOC), the Department of Justice's Office of Special Counsel (OSC), and the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The EEOC administers several statutes prohibiting discrimination in employment based on factors such as age, race, color, religion, sex, or national origin. OFCCP administers several statutes and an executive order prohibiting discrimination by Federal government contractors and subcontractors based on factors such as race, color, religion, sex, national origin, disability, and veteran status. EEOC and OFCCP offices are located throughout the United States and can be located in the blue pages of the telephone directory. Complaints can be made to the EEOC by telephone at: (202) 275–7377; see also their website at *www.eeoc.gov.* Complaints can be made to OFCCP by telephone at: (202) 693–0102, –0106, or by contacting the local offices, which can be located at its website, *www.dol.gov/dol/esa/public/contacts/ofccp/ofcpkeyp.htm.*

OSC administers several statutes concerning employment discrimination based on national origin, citizenship status, and immigration document abuse. OSC can be contacted at P.O. Box 27728, Washington, DC 20038–7728; telephone: 1–800–255–7688 (workers) or 1–800–255–8155 (employers); and e-mail address: *osc.crt@usdoj.gov;* see also OSC's website at *www.USDOJ.gov/crt/osc.*

TCS described its own hiring practices, which it contended should be allowed as legitimate under the Department's regulations. Specifically, TCS recruits its employees from university campuses (apparently in India) and places them in a 12-to 18-month training program in India. At the same time requiring a three-year commitment from its employees, whom it sends on assignments in India and throughout the world. TCS suggested that the Department's proposal could be read to require TCS instead to recruit U.S. workers for assignments in the United States without regard to the employment terms and conditions it applies to its other employees—a requirement which it suggested could potentially subject it to anti-discrimination claims. TCS argued that the Department's proposal incorrectly focused on the recruitment/employment for the particular job listed on an LCA rather than the dependent employer's hiring criteria for a position with the dependent employer—a position that encompasses duties and responsibilities beyond those required for the performance of the particular job covered by an LCA. TCS explained that its employees, including those it places in H–1B positions, serve as team members of consulting groups that will move from job to job in the United States and elsewhere. It stated that it hires employees with this enduring employment relationship in mind, not for the employee's particular assignment to a job in the United States.

Similar practices are described by Simmons, which asked whether a foreign-based employer may give preference to its own (foreign) workers, who are familiar with the specific technologies and protocols of an ongoing project, and whether it would be required to offer permanent as distinguished from temporary positions to employees in the U.S., since it otherwise would only temporarily transfer its permanent, foreign workers to perform the job in the U.S. Simmons also commented that it provides extensive training to its employees in India, and asked if it could require that U.S. workers have such skills, or would it be required to use the hiring criteria it utilized to hire the workers in India. Finally, Simmons asked if it could require U.S. workers to have the precise, specialized skills to meet a specific customer need.

In the Department's view, an employer's recruitment obligation attaches to the position for which an H–1B worker is sought in the United States (the employer is obliged to take, in the words of the statute, ''good faith steps to recruit . . . United States workers for the job for which the [H-1B worker(s)] is or are sought''). Additionally, the employer is required to offer the job to the U.S. worker if the worker is at least as qualified as the H–1B worker. Accordingly, the focus must be on the particular job(s) in the United States which is/are covered by the LCA, not the position an H–1B applicant already occupies or will occupy with the dependent employer. An employer will fail to meet its recruitment obligation if it utilizes recruitment/selection criteria that have the effect of precluding an equally or better qualified U.S. worker from being hired for the position. The Department also notes that L visas, where the criteria are met, may be available as an alternative method to accommodate intra-company transfers.

5. What Documentation Would Be Required of Employers? (§ 655.739(i))

Concerning documentation to show that good faith recruitment was conducted in accordance with industry-wide standards, the NPRM stated that an employer would not need to retain actual copies of advertisements, provided it kept a record of the pertinent details. The Department proposed that an employer's public access file need only contain information summarizing the principal recruitment methods used in soliciting potential applicants and the time frame in which such recruitment was conducted. The NPRM also requested comments on how employers can and should determine industry-wide standards and how to make the employer's determination available for public disclosure.

With regard to documentation concerning pre-selection treatment of applicants for employment, the Department proposed in the NPRM that employers should retain any documentation they receive or prepare concerning the consideration of applications by U.S. workers, such as copies of applications and/or related documents, test papers, rating forms, records regarding interview and job offers. The Department stated its view that the EEOC already requires employers to retain such records and therefore this requirement imposes no new obligations on employers.

With regard to the proposed documentation requirement, Senator Abraham stated: ''The intent is not to require employers to retain extensive documentation in order to be able retroactively to justify recruitment and hiring decisions, provided that the employer can give an articulable reason for the decisions that it actually made.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

AILA and ACIP cited Senator Abraham's statement in the *Congressional Record* for the principle that the ACWIA did not impose any extensive documentation requirements. ACIP, however, stated its belief that prudent employers of their own volition may want to retain documentation and that it is appropriate for the Department to provide guidance on how long employers should retain such documentation.

The Department disagrees with the view that the ACWIA denies the

Department the usual regulatory authority to require recordkeeping as a means of ensuring compliance with an employer's statutory obligations—either generally or with specific reference to the recruitment obligation. The fact that the H–1B program is primarily complaint-driven with only attestations of compliance filed initially with the Department makes it all the more important that documentation be retained so that the Department can determine compliance in the event of an investigation. In response to AILA's comment about the length of time which documents must be retained, the Department notes that its standard record retention requirements are set forth in § 655.760(c) of the regulation, which has been clarified as discussed in IV.B.3, above.

With regard to documents concerning recruitment practices, the AFL–CIO and Miano urged that employers be required to retain copies of all job advertisements or other recruiting efforts. AILA asserted that the Department's statement that an employer need not keep copies of advertisements is an illusory saving because as a practical matter saving these documents is the only way to document the information the Department proposed to require. AILA recommended that employers only be required to keep a summary of their recruitment for the past six months, similar to the requirements of the RIR procedures in the permanent labor certification program—especially when an employer is still recruiting for open positions and it is its practice to hire U.S. as well as H–1B workers. However, AILA stated that employers should not be required to keep recruitment information in public access files because it invites competitor intrusion into an employer's recruitment practices.

The Interim Final Rule, like the proposal, requires employers to retain documentation of the recruiting methods used, including the places and dates of the recruitment, advertisements, or postings; the content of the advertisements and postings; and the compensation terms (if not included in the content). The Department continues to believe that copies of print advertisements are not necessary since publication can be verified if necessary. Rather, the documentation may be in any form, such as a copy of an order or response from the publisher, an electronic or print record of an Internet notice, or a memorandum to the file. Similarly, the documentation of recruitment of positions filled by H–1B nonimmigrants need not be segregated from other records provided it is available to the Department upon request in the event of an investigation.

In addition, as proposed, the employer will be required to maintain a summary of the recruitment methods used and time frames of recruitment in its public access file. The Department does not believe that information in this summary nature will unduly disclose proprietary information since advertisements and attendance at job fairs are public in any event.

ACIP was the only commenter responding to the Department's request for comments on how employers should determine industry-wide recruitment standards, stating only that it is unaware of any source that catalogues standard recruiting practices within an industry. The Department repeats its request for further information on this point. The Department has determined that employers will not be required to maintain evidence of industry practice. However, in the event of an investigation, the employer will be required to substantiate its assertion as to industry practice through credible evidence, such as through trade organization surveys, studies by consultative groups, or a statement from a trade organization regarding the industry norm(s). The Department will look behind such evidence as it deems appropriate in the context of the particular recruitment performed by an employer.

With regard to documentation concerning pre-selection treatment of applicants, AILA disagreed with the Department's characterization of EEOC guidelines, stating that EEOC only requires that if documentation is created or retained, it must be done consistently. It also stated that it is impractical to expect an employer to retain what may be thousands of resumes submitted to it at a job fair, especially since many resumes do not even relate to positions offered.

As discussed in detail in IV.D.8, above, in connection with the retention of records relating to displacement of U.S. workers, the Department disagrees with AILA's characterization of the EEOC requirements. The Department continues to believe that most employers are already required to preserve copies of the records listed and that retention of the documents is necessary to demonstrate fair treatment of U.S. applicants. ADEA regulations, for example, require an employer to preserve all records it makes, obtains or uses relating to ''[j]ob applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to his advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual, * * * [j]ob orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings, * * * [a]ny advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work.'' 29 CFR 1627.3(b)(i).

The Department emphasizes that it is not requiring employers to create any documents regarding treatment of applicants for employment, but rather to preserve those documents which are created or received. With regard to the comment regarding job fairs, this rule would not require employers to retain any resumes which do not relate to the positions to be filled by H–1B nonimmigrants. Nor does the Interim Final Rule require that any information relating to treatment of applications be maintained in the public access file.

F. What Are the Requirements for Posting of Notice? (Combined With Section O.5 of the Preamble to the NPRM) (§ 655.734(a)(1)(ii)(A) and (B))

Section 212(n)(1)(C) of the INA, 8 U.S.C. 1182(n)(1)(C), requires that, at the time of filing the LCA, an employer seeking to hire an H–1B nonimmigrant shall notify the bargaining representative of its employees of the filing or, if there is no bargaining representative, post notice of filing in conspicuous locations at the place of employment. As amended by the ACWIA, Section 212(n)(1)(C) further provides (where there is no bargaining representative) that the notice may be accomplished ''by electronic notification to employees in the occupational classification for which the H–1B nonimmigrants are sought.''

1. What Are the Requirements for Posting of ''Hard Copy'' Notices at Worksite(s) Where H–1B Workers Are Placed? (NPRM Section O.5) (§ 655.734(a)(1)(ii)(A))

Regulations with respect to this notification requirement were published by the Department as a Final Rule on December 20, 1994 (59 FR 65646, 65647). That Final Rule (set forth in the current Code of Federal Regulations) required, among other things, that an employer, who sends an H–1B worker to a worksite within the area of intended employment listed on the LCA which was not contemplated at the time of filing the LCA, post a notice at the worksite on or before the date the H–1B nonimmigrant begins work. 20 CFR 655.734(a)(1)(ii)(D). The purpose of the

provision was to enable employers to place H–1B workers at worksites where posting had not occurred without filing a new LCA. This provision was among those enjoined for lack of notice and comment by the court in *National Association of Manufacturers* v. *Reich (NAM)*, 1996 WL 420868 (D.D.C. 1996). On October 31, 1995, during the pendency of the *NAM* litigation, the Department republished the regulation for comment (60 FR 55339).

In the 1999 NPRM, the Department proposed for comment § 655.734(a)(1)(ii)(A) (previously published for notice and comment in the October 31, 1995 proposed rule as § 655.734(a)(1)(ii)(C) and (D)). The provisions regarding ''hard copy'' notice requirements remained essentially unchanged from the 1995 proposed rule. Subclause (A)(3) requires employers to post notice at worksites on or within 30 days before the date the LCA is filed. Subclause (A)(4) requires that where the employer places an H–1B nonimmigrant at a worksite which is not contemplated at the time of filing the LCA, but is within the area of intended employment listed on the LCA, the employer is to post notice at the worksite (either by hard copy or electronically) on or before the date any H–1B nonimmigrant begins work there. The preamble explained that posting is not required if the location is not a ''worksite,'' as discussed in proposed Appendix B of the NPRM.

Fourteen commenters responded to the 1995 proposed rule on notification. Eight of those commenters (AILA, ACIP, Intel, Microsoft, Motorola, NAM, Complete Business Solutions, Inc. (CBSI), and Moon, Moss, McGill & Bachelder (Moon)) objected to posting at worksites not controlled by the LCA-filing employer. These commenters asserted that many employers' customers would not allow posting at their worksites. In addition, because the regulations define ''place of employment'' as the worksite or physical location at which the H–1B nonimmigrant's work is actually performed, some commenters expressed a concern that strict application of this definition of place of employment could lead to absurd and/or unduly burdensome notice requirements such as posting notice at a restaurant when an H–1B nonimmigrant has a business lunch, at a courthouse when the nonimmigrant makes a court appearance, or at an out-of-town hotel when the nonimmigrant attends a training seminar. One commenter (Microsoft), expressed concern about the burden of notification and suggested that the notice provision should not apply to employers who do not make great use of the H–1B nonimmigrant worker visa program.

The Department received six comments on these provisions in response to the 1999 NPRM.

The AFL–CIO emphasized the importance of giving notice to all affected employees, including employees of the secondary employer and employees of other staffing firms. The AFL–CIO stated that the purpose of the notice is to provide information to affected workers that they may have certain rights and that the employer has certain duties regarding placement of the H–1B worker which are not diminished because the worksite is ''short-term'' or ''transitory.''

Four employer organizations (ACIP, AILA, ITAA, NACCB) commented on the issue of notification (whether hard-copy or electronic) to affected workers at third-party worksites. These groups contended that the statute requires an employer to notify only its own employees and that it is unreasonable to hold a primary employer responsible for notifying employees at worksites over which it lacks control. AILA gave as an example, workers such as service engineers who travel to a number of worksites during the course of a day or a week. AILA stated that if a client refuses to post notice, an H–1B worker cannot be sent to the site, resulting in a potential loss of business.

One commenter (Latour) requested that the regulation specify that worksite posting requirements do not apply to rehabilitation professionals providing home health care.

The Department has carefully considered the comments submitted in response to the 1995 proposed rule and the 1999 NPRM. The Department notes first that the statute requires that notice be posted at the place of employment. See Section 212(n)(1)(C)(ii). The Department's regulations have consistently defined ''place of employment'' as ''the worksite or physical location where the work is performed.'' 20 CFR 655.715 (1992).

This definition was modified slightly in the 1994 Final Rule (currently in effect) to provide ''where the work actually is performed.''

Furthermore, the purposes of notification can only be satisfied by notice to all of the affected workers—*i.e.,* all of the workers in the occupation in which the H–1B worker is employed at the place of employment, including employees of a third-party employer. This is critical because of the real possibility of displacement by the H–1B employees. Although this would only be a violation if the employer is an H–1B-dependent employer or willful violator, there remains a real possibility that U.S. workers of other employers could be harmed by the placement of the H–1B worker. Thus the notice alerts affected employees to the fact that an LCA has been filed and that H–1B workers will be placed at the worksite. Without such notice affected workers would not be able to file complaints regarding H–1B violations either with regard to themselves (if they are displaced because of a placement by an H–1B-dependent employer or willful violator), or with regard to the H–1B workers (which might indirectly affect themselves).

The Department observes that a number of employers' concerns with respect to notification of affected employees, either by hard copy posting or electronically, at third-party work sites, have been addressed by the interpretation of ''place of employment''/''worksite'' discussed in detail in IV.P.1 and .2 of the preamble and § 655.715 of the Interim Final Rule (see Appendix B of the NPRM). As stated in § 655.715, the Department interprets ''place of employment'' as excluding locations where the H–1B worker's presence either is due to the developmental nature of his/her activity (*e.g.,* management seminar; formal training seminar), or is short-term (not exceeding five consecutive workdays for any one visit) and transitory due to the nature of his/her job (*e.g.,* computer ''troubleshooter,'' sales representative, trial witness). Under this interpretation, employers would not be required to give notice in many of the situations about which concerns have been expressed, but would be required to give notice in those instances where the Act and its purposes require. If a location does not constitute a ''worksite,'' the employer is not required to post notice.

Although the Department recognizes that in some instances it may be inconvenient for an employer to post notice at a worksite controlled by another business (such as the customer of an employer), the Department notes that its experience in enforcement is that no employer has been unable to post notices at a customer's worksite when the operator, owner, or controller of the worksite was informed that posting was required by the statute and the regulations.

The Department agrees with the comment that notice need not be provided where a rehabilitation professional is providing services in the client's home. The Interim Final Rule provides in paragraph (2) of the definition of ''place of employment'' in § 655.715, that ''a physical therapist

providing services to patients in their homes within an area of employment'' is an example of a non-worksite location; in these situations notice must be posted at the worker's home station or regular work location.

2. What is Required for ''Electronic Posting'' of Notice to Employees of the Employer's Intention to Employ H–1B Nonimmigrants? (§ 655.734(a)(1)(ii)(B))

The Department also proposed a regulation, § 655.734(a)(1)(ii)(B), which would implement the ACWIA provision allowing electronic notification of employees. The ACWIA modified the statutory requirement for worksite posting of notices (where there is no collective bargaining representative), to permit an H–1B employer to use electronic communication as an alternative to posting ''hard copy'' notices in conspicuous locations at the place of employment.

Senator Abraham explained: ''An employer may either post a physical notice in the traditional manner, or may post or transmit the identical information electronically in the same manner as it posts or transmits other company notices to employees. Therefore, use of electronic posting by employers should not be restricted by regulation.'' 144 Cong. Rec. S12751 (Oct. 21, 1998).

Congressman Smith elaborated: ''By providing this flexibility, Congress intended to improve the effectiveness of posting in the protection of American workers. Therefore, the electronic notification must actually be transmitted to the employees, not merely be made available through electronic means such as inclusion on an electronic bulletin board.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

As the NPRM explained, in providing this alternative method for notification to affected workers, Congress indicated no intention of reducing the effectiveness of the notice requirement which has been an element of the H–1B program from its inception. The proposed regulation therefore provided that electronic notice may be accomplished by any means the employer ordinarily uses to communicate with is workers about job vacancies or promotion opportunities. Thus the NPRM stated that notice would be permitted through the employer's ''home page'' or ''electronic bulletin board'' where employees as a practical matter have direct access; or through e-mail or other actively circulated electronic message such as the employer's newsletter, provided the employees have computer access readily available. Where such computer access is not readily available, the NPRM explained that notice may be accomplished by posting a ''hard copy'' at the worksite.

The preamble further explained at Section O.5 that where the H–1B nonimmigrant(s) will be employed at the worksite of another employer, the H–1B employer is required to provide notice to the affected workers at that worksite. Thus, the H–1B employer may make arrangements with the other employer to accomplish the notice (*e.g.,* the other employer may ''post'' the electronic notice on its Intranet or employee newsletter, or may ''post'' hard copy notice in conspicuous locations at the place of employment).

The Department received 30 comments, including 22 from individuals, on the 1999 NPRM provisions regarding electronic notice.

The individuals generally objected to the statutory provision allowing electronic posting as an alternative to hard copy posting, asserting that Internet posting alone allows companies to hide replacement of American workers with foreign workers. The AEA essentially expressed a similar view on electronic posting, noting that the Internet/Intranet method of notification is unworkable.

The AFL–CIO commented that electronic posting should only be allowed if employers can show that all workers have access to e-mail or the Internet site, and that all notices are flagged to them. Another employee organization, IEEE, emphasized that to be an effective notice, electronic communications must be readily available and accessible to all affected U.S. and foreign workers.

ACE, ACIP and SHRM commended the Department for its flexibility on methods of electronic posting. ACIP recommended that the Department distinguish between ''indirect'' and ''direct'' electronic notices, suggesting that where ''indirect'' notice is given, such as on a bulletin board, the employer should have to make the notice available for 10 days. If, however, the employer provides direct notice, such as e-mail to each employee, ACIP suggested that notice should only have to be sent to each affected employee once. SHRM urged the Department to allow an employer to document that notice has been given by permitting the employer to place a signed notice in the public access file regarding how notice was provided. AILA recommended amending the regulations to clarify that an employer may satisfy its electronic posting obligation by providing the notification on its internal network or website. AILA also recommended that with respect to employers which send the notice by e-mail, the regulation should specify that notification sent to a distribution group of ''affected workers'' satisfies the electronic posting requirement. Another commenter (Cooley Godward) sought clarification on the issue of how electronic posting can comply with the requirement of § 655.734(a)(1)(ii)(A) that the LCA be posted in two or more conspicuous places, and on whether or not all four pages of the LCA must be posted.

With regard to posting at third-party worksites, AILA suggested that a primary employer should be able to satisfy its obligation to document that an electronic posting was made at the work site of a third-party employer in any one of the following three ways: (1) A statement in the contract between the parties requiring the notification to be made; (2) a written statement by a responsible party at the third-party location; or (3) a printout of the electronic communication with a certification about when, how, and to whom it was sent.

The statute does not give the Department the discretion to disallow electronic posting, as suggested by the individual commenters. The Department agrees with the AFL–CIO and the IEEE, however, that the critical consideration is that the notice is readily available and accessible to the affected workers. The Department believes that the proposed regulation, as drafted, meets these concerns. Posting must be by the means the employer ordinarily uses to communicate with its workers about job vacancies or promotion opportunities. Posting on the employer's ''home page'' or electronic bulletin board is allowed where employees as a practical matter have direct access to these resources. Where employees lack computer access, a hard copy must be posted or the employer may provide employees individual copies of the notice.

The Interim Final Rule clarifies the operational requirements for electronic posting. Like the physical posting, the electronic notice need not incorporate a copy of the LCA, although it would be permissible since a copy of the LCA would satisfy the substantive requirements (see § 655.734(a)(1)(ii)). (Employers are reminded that all H–1B nonimmigrants must be given a copy of the LCA. See § 655.734(a)(2).) Like ''hard copy'' posting, electronic posting on a ''home page'' or electronic bulletin board must be posted for 10 days. If direct notice is given to each affected employee, as through e-mail or ''hard copy'' notices, the notice need only be given once during the regulatory time

period. Notice by e-mail may be provided by notification to an e-mail group consisting of all of the affected employees. Electronic posting, unlike hard copy posting, need not be posted in two locations, provided all the affected employees, as a practical matter, have access to the website or bulletin board. Another method of posting would have to be used to reach those employees who do not have such access. For example, home care therapists may not have practical access to a computer at all as a part of their job. Where there is no such access, physical posting at two sites in the home office or individual copies of the notice would be necessary. The Department believes the existing documentation provision is broad enough to encompass electronic posting, both at the employer's own worksite and at another employer's worksite.

The Interim Final Rule also clarifies that electronic notification, like other physical posting, shall be provided in the period on or before 30 days before the date the LCA is filed. Where H–1B nonimmigrants are placed at a worksite not contemplated when the LCA was filed, the notification shall be provided on or before the date the H–1B nonimmigrant begins work at the site.

Finally, upon review of the provisions of the ACWIA, the Department has concluded that some modification of the required notice is appropriate. Specifically, the Department has concluded that the content of the notice should be modified to require dependent employers and willful violators to notify affected workers, through the methods provided herein, that they are H–1B-dependent or a willful violator, subject to the requirements for recruitment and non-displacement of U.S. workers. Where the employer is dependent (or a willful violator) but will employ only exempt workers, the notice must so provide, and further state that it is not subject to the recruitment and non-displacement requirements. In addition, the notice about filing complaints with the Department of Justice for failure to offer employment to an equally or better qualified U.S. worker will only be required for H–1B-dependent employers and willful violators. Finally, because the full attestations are set forth in the cover sheet, Form ETA 9035CP, the provision in § 655.734(a)(3) requiring employers to give copies of the LCA to all H–1B nonimmigrants has been modified to provide that copies of the cover sheet shall be given to the H–1B nonimmigrant upon request.

G. What Does the ACWIA Require of Employers Regarding Benefits to H–1B Nonimmigrants? (§ 655.731(c)(3), § 655.732)

Section 212(n)(2)(C)(viii) of the INA as amended by the ACWIA states that ''[i]t is a failure to meet a condition of paragraph 1(A) [the wage and working condition attestation requirements] * * * to fail to offer an H–1B nonimmigrant, during the nonimmigrant's period of authorized employment, benefits and eligibility for benefits (including the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation such as stock options (whether or not based on performance) on the same basis, and in accordance with the same criteria, as the employer offers to United States workers.''

Senator Abraham and Congressman Smith described the operation of this provision in similar terms. Senator Abraham explained:

> This obligation is only an obligation to make benefits available to an H–1B worker if an employer would make those benefits available to the H–1B worker if he or she were a U.S. worker. Thus, if an employer offers benefits to U.S. workers who hold certain positions, it must offer those same benefits to H–1B workers who hold those positions. Conversely, if an employer does not offer a particular benefit to U.S. workers who hold certain positions, it is not obligated to offer that benefit to an H–1B worker. Similarly, if an employer offers performance-based bonuses to certain categories of U.S. workers, it must give H–1B workers in the same categories the same opportunity to earn such a bonus, although it does not have to give the H–1B worker the actual bonus if the H–1B worker does not earn it.

144 Cong. Rec. S12753 (Oct. 21, 1998). See also the statement of Congressman Smith, 144 Cong. Rec. E2326.

Senator Abraham continued:

> While this clause is not intended to require that H–1B workers be given access to more or better benefits than a U.S. worker who would be hired for the same position, it does not forbid an employer from doing so. For example, an employer might conclude that it will pay foreign relocation expenses for an H–1B worker whereas it will not pay such relocation expenses for a U.S. worker.

144 Cong. Rec. S12753 (Oct. 21, 1998).

Congressman Smith, on the other hand, stated that ''[t]he statement 'on the same basis' is intended to mean equal or equivalent treatment, not preferential treatment for any group of workers. Thus, if an employer offers benefits to American workers, it must offer those same benefits to H–1B workers.'' 144 Cong. Rec. E2326 (Nov. 12, 1998).

Senator Abraham also explained that ''care must be taken to find the right U.S. worker to whom to compare the H–1B worker in terms of access to benefits. * * * If a particular benefit is available only to an employer's professional staff, then it only need be made available to an H–1B filling a professional staff position. If an employer's practice is not to offer benefits to part-time or temporary U.S. workers, then it is not required to offer benefits to part-time H–1B workers or temporary H–1B workers employed for similar periods.'' 144 Cong. Rec. S12753 (Oct. 21, 1998).

Senator Abraham and Congressman Smith differed in their view as to the application of the provision to multinational corporations. Thus Senator Abraham stated:

> If an employer's practice is to have its U.S. workers brought in on temporary assignment from a foreign affiliate of the employer remain on the foreign affiliate's benefits plan, then it must allow its H–1B workers brought in on similar assignments to do the same. Likewise, in that instance, it need not provide the H–1B workers with the benefits package it offers to its U.S. workers based in the U.S. Indeed, even if it does not have any U.S. workers stationed abroad whom it has brought in this fashion, it should be allowed to keep the H–1B worker on its foreign payroll and have that employee continue to receive the benefits package that other workers stationed at its foreign office receive in order to allow the H–1B worker to maintain continuity of benefits. In that instance, the basis on which the worker is being disqualified from receiving U.S. benefits (that he or she is receiving a different benefits package from a foreign affiliate) is one that, if there were any U.S. workers who were similarly situated, would be applied in the same way to those workers. Hence the H–1B worker is being treated as eligible for benefits on the same basis and according to the same criteria as U.S. workers. It is just that the criterion that disqualifies him or her happens not to disqualify any U.S. workers. Or to put the point a little differently: The H–1B worker is being given different benefits from the U.S. workers not because of the worker's status as an H–1B worker but because of his or her status as a permanent employee of a foreign affiliate with a different benefits package.

Ibid.

Congressman Smith had a different perspective:

> There is particular concern regarding such erosion in instances where a foreign affiliate of a petitioning employer is involved as the agent for payment of wages and provision of benefits to the H–1B workers. The statutory obligations must be fully met in such instances. Congress intends that the ultimate and complete responsibility for all employer obligations under this Act, including the provision of benefits to the H–1B worker equal to those offered the employer's

American workers based in the U.S., lies with the American (United States) employer who brings nonimmigrant workers into the country. Ultimately, it is the American employer, not the foreign subsidiary, pledging a benefit package similar to that of its American workers. Congress would expect the Secretary to look with particular care at circumstances involving a foreign subsidiary where there is an appearance of contrivance to avoid the obligation to provide equal wages and benefits to H–1B and American workers.

144 Cong. Rec. E2326 (Nov. 12, 1998).

1. What Does ''Same Basis and Same Criteria'' Mean With Respect to an Employer's Treatment of U.S. Workers and H–1B Workers With Regard to Benefits? (§ 655.731(c)(3), § 655.732)

In the NPRM, the Department proposed that: (a) An employer is required to offer H–1B workers the same benefit package it offers to U.S. workers; (b) the package must be offered on the same basis as it is offered to U.S. workers, *i.e.,* the employer may not impose more stringent eligibility or participation requirements on the H–1B workers than those applied to U.S. workers; (c) the comparison between the benefits offered U.S. and H–1B workers should be between similarly employed workers, *i.e.,* those in the same employment categories, such as full-time compared to full-time, professional to professional; and (d) the benefits actually provided to the H–1B workers, as distinguished from the benefits offered, might be different than those provided to U.S. workers because of an individual's choice among options. The Department also sought comments regarding whether the ACWIA would allow an employer to provide a different, but ''equivalent package'' to satisfy its benefits obligation, noting the difficulty of making an evaluation of the benefits—particularly a qualitative evaluation of the benefits, as distinguished from one based on the relative costs to the employer of providing such benefits.

The Department further proposed that an employer, consistent with its attestation to adhere to minimum standards for H–1B workers, may provide greater benefits to H–1B workers than to U.S. workers. The Department acknowledged, however, that the phrases ''same basis'' and ''same criteria,'' applied literally, could require that U.S. and H–1B workers be offered the same (or possibly equivalent) benefits.

The Department noted the possible complications that might arise with respect to benefits afforded employees of a multinational corporate operation, particularly where the H–1B worker works in the U.S. for only a short period of time. In this situation, the NPRM noted, it might not be practical for the U.S. employer to provide the H–1B worker with benefits identical to those provided its U.S. workers. The Department proposed that while the U.S. employer may cooperate with its corporate affiliate in the worker's home country with regard to the payment of wages to the worker and the maintenance of his or her ''home country'' benefits (such as that country's retirement system), the U.S. employer remains ultimately responsible for ensuring that the H–1B worker is provided benefits at least equal to those offered U.S. workers. The Department stated that it would look closely into situations involving a foreign affiliate where there was the appearance of a contrived arrangement to avoid the U.S. employer's obligation to provide to its H–1B workers wages and benefits at least equal to those provided its U.S. workers. At the same time, the Department proposed that it would carefully examine the circumstances to consider non-equivalent but nonetheless equitable benefits, including the H–1B worker's actual length of stay in the United States.

The Department also proposed to modify § 655.732 of the current regulations to clarify that an employer must provide the H–B worker with fringe benefits and working conditions at least equal to those provided U.S. workers. The NPRM noted that such a modification would make it clear that the requirement that the H–1B employer provide working conditions, including benefits, that will not adversely affect those provided similarly employed U.S. workers, requires consideration of similarly employed workers in the employer's own workforce and, in some circumstances, the prevailing conditions in the area of employment.

Finally, the Department sought comment on whether it would be beneficial to develop a regulatory definition of ''benefits'' within the meaning of the ACWIA or merely to provide a list of examples. The NPRM noted that the ACWIA contemplates the inclusion of various forms of cash and non-cash compensation, such as bonuses and stock options, which ordinarily are considered wages.

Several commenters, including AOTA, APTA, IEEE, and an attorney (Latour), generally endorsed the Department's NPRM approach in this area. IEEE stated that the Department's proposal ''will help implement the letter and the spirit of the law that the wages and working conditions of U.S. workers not be adversely affected'' and, at the same time, ''help to reduce the likelihood that employers will discriminate against H–1B workers by offering them less generous benefits.''

Senators Abraham and Graham and AILA noted that the NPRM created some confusion by failing to make it clear that an employer must offer ''benefits and eligibility for benefits'' on the same basis as offered to U.S. workers. Citing to Senator Abraham's statement in the Congressional Record, these commenters stated that this phraseology was important because workers must be or make themselves eligible to obtain benefits—*e.g.,* by selecting a plan, providing partial payment, working for a period of time, or performing at a high level. Similarly, ACE requested the Department to make clear that a comparison should be made between the benefits offered to workers, not the benefits actually selected by the workers. ACE mentioned, as one example, ''cafeteria plans'' offered by many employers. Under these plans, it explained, employees choose certain benefits and not others for a variety of reasons.

The Department agrees that the ACWIA requires an employer to offer H–1B workers benefits and eligibility for benefits on the same basis and in accordance with the same criteria as U.S. workers. Because employers often offer workers a choice of benefits, the ACWIA does not require that U.S. workers and H–1B workers actually receive the same benefits. Similarly, some employees may opt for ''family'' coverage of certain benefits, while others opt for ''individual'' coverage. Furthermore, as the commenters noted, workers may be required to meet certain criteria or take certain action to avail themselves of the benefits. However, an employer cannot satisfy its statutory requirement by ''offering'' benefits which it never actually provides to selecting workers. Thus, as discussed below, employers are required to retain documentation showing that employees actually receive the benefits that they have selected. While the Department believes that the NPRM comported with the statutory language, the Interim Final Rule clarifies these requirements in order to eliminate any ambiguity.

AILA and ACIP agreed with the Department's proposal that an employer lawfully may offer and provide greater benefits to H–1B workers than those offered to U.S. workers. The AFL–CIO asserted the contrary position. In the AFL–CIO's view, an employer should be required to provide identical benefits to H–1B and U.S. workers, a result it argues is consistent with the ACWIA's ''same basis'' requirement. Senators

Abraham and Graham suggested that the statute would allow employers to offer benefit incentives above and beyond normal benefits to lure foreign-based employees with critical skills to work in the United States. The Senators suggested that so long as the packages are offered on the same basis to U.S. and foreign nationals based abroad, the practice should be permitted.

In the Department's view, the statute does not require that H–1B workers and U.S. workers be offered the same benefits. While perhaps Section 212(n)(2)(C)(viii), read in isolation, could be read to require this result, this provision must be read in the context of the entire statute. Section 212(n)(2)(C)(viii) provides that it is a failure to meet paragraph (1)(A)—the wage requirements of the Act—to fail to provide the required benefits. Section 212(n)(1)(A)(i) in turn provides that the employer must offer wages that are ''at least'' those paid to similar workers. The Department notes, however, that an H–1B-dependent employer or willful violator, when it conducts good faith recruitment pursuant to section 212(n)(1)(G)(i), must offer U.S. workers the same compensation (including benefits) as it will offer the H–1B workers in the recruited positions. Furthermore, providing greater benefits to H–1B workers may violate requirements of the various discrimination laws. The agencies that enforce discrimination requirements and their telephone numbers and website addresses are set forth above in IV.E.4, above.

Senators Abraham and Graham asserted that the Department should look at the employer's entire benefits structure as it concerns ''benefits eligibility for its workforce generally'' to make sure that the comparison is made to the right employees. These Senators and AILA suggested that comparisons could appropriately be made on such bases as part-time vs. full-time workers, positions requiring extensive travel vs. those that do not, relative seniority, the particular organizational component to which the workers are assigned, and whether the individual occupies a position for which special incentives should apply. Similarly, ACIP suggested that the Department look beyond a simple full-time/part-time distinction.

The Department agrees that it should look at an employer's benefits structure. Employers commonly provide different benefits, for example, based on part-time vs. full-time status, seniority, union vs. non-union, organizational component, etc. The Department agrees that H–1B workers should be provided benefits based on their position in the organizational structure, provided the employer utilizes the same distinctions on an organization-wide basis. However, the Department will not accept artificial distinctions which are not generally accepted in the industry and which have the result of denying benefits to H–1B workers on the basis that there are no comparable workers in the organization or which otherwise have the effect of discriminating between workers on the basis of citizenship, nationality, or other prohibited grounds.

The Interim Final Rule incorporates these principles. The Interim Final Rule also prohibits employers from denying benefits based on the H–1B worker's temporary status since all H–1B workers, by virtue of their visa restrictions, are temporary workers. Thus, an employer by utilizing ''temporary'' as a basis for comparison could evade offering to these workers the benefits that typically would be paid to workers hired on a ''permanent basis,'' even though the tenure of workers in each group might be of comparable duration, thereby effectively nullifying the statutory provision. An employer would, however, be allowed to require that an H–1B workers meet eligibility and vesting requirements.

Sun Microsystems suggested that to the extent there was a perceived need for greater scrutiny over fringe benefits, the Department's efforts should be restricted to dependent employers. The Department disagrees. Unlike some other provisions of the ACWIA, the ''same basis''/''same criteria'' provision applies to all H–1B employers.

TCS asserted that the Department ''should clarify that, where length of service is applicable to the amount of the benefit, only the H–1B non-immigrant's length of service in the United States, and not the H–1B's entire length of service with the employer should be included in the calculation.''

It is the Department's view that an employer is required to offer benefits on the same basis as it offers benefits to its U.S. employees. If an employer offers benefits based on length of service for the employer, it must offer benefits to its H–1B workers on that basis as well. (See the discussion below regarding treatment of multinational organizations.)

APTA suggested that the INS inform all H–1B workers of their right to be offered the same benefits as U.S. workers, to better ensure that they receive the benefits due them. The Department notes that every H–1B worker is required to receive a copy of the LCA, which contains a brief reference to this requirement. Section III.B of the Preamble, above, discusses in greater detail the Department's plans to disseminate information regarding the program's requirements.

In response to the Department's query, BRI and AILA contended (without citing support for their position) that the ACWIA contemplates that an employer may satisfy the benefits attestation by offering H–1B workers different but ''equivalent'' benefit packages relative to the benefits offered to U.S. workers. BRI further stated that such benefits should be compared according to their monetary value.

The Department has concluded, as a general matter, that the statute's ''same basis'' provision does not permit an employer to offer its H–1B workers benefits ''equivalent'' to but different from those offered its U.S. workers. The Department notes that these commenters, like other commenters, appeared to be concerned with benefits provided by multinational corporations, which are discussed separately below.

Intel and ACIP stated that a few countries prohibit their citizens from owning stock in foreign corporations. Cooley Godward also raised the question of benefits such as stock options whose accrual will terminate after an H–1B employee's period of status ends.

Although there is nothing which requires an employee to take advantage of a stock option, it is the Department's view that if an employer is aware that its H–1B worker(s) is prohibited from taking advantage of a stock option because of laws of the worker's home country, the employer should offer such worker(s) an alternative benefit of comparable value. With regard to the question of stock options or benefits which will accrue after termination of an H–1B worker's period of status, such benefits should be provided on the same basis as they would otherwise be provided to workers who are no longer in the firm's employ (or who have transferred back to the home office). If other workers have a right to exercise the option or receive the benefit even if they are no longer in the firm's employ, the same would be true with regard to H–1B workers.

Turning to the question of treatment of employees of multinational firms, Senators Abraham and Graham asserted that the Department's proposal ''appear[s to provide no] consideration of the question of who the right similarly situated worker to compare [the transferee] is, and whether there actually is one.'' They, instead, suggested that the Department should focus on the transferee's status as a permanent employee with the

employer's foreign affiliate, rather than his or her status as an H–1B worker.

TCS stated that it appreciated the Department's sensitivity to the issue of the application of the benefits requirement to employees who receive a range of benefits from their foreign employer and are only in the United States on short-term assignments in connection with their long-term employment with the foreign employer. TCS contended, however, that the requirement that H–1B workers be provided benefits equivalent to those received by U.S. workers is contingent upon the existence of ''similarly employed'' workers in the United States. TCS argued that because it is an Indian company and its employees receive India-based benefits, they are not similarly employed to any computer engineers it might hire in the United States, and that TCS would therefore be relieved from any obligation to offer new benefits to its workers during the period of their temporary employment in the United States.

ACIP commented that a ''length of status'' test ''wrongly assumes that the practice of maintaining a foreign benefits program is a matter of convenience, when, in fact, the practice is maintained because the disruption often causes the employee to lose vested interest in a benefit plan.'' Instead, they suggested, ''[t]he Department should adopt a rule that allows for a transferee to maintain his or her foreign benefits as long as such benefits plan is administered abroad continuously without interruption and as long as the company typically offers this option to all international transferees.'' Similar comments were made by AILA and Intel, which stated that it is in the employees' best interest to stay on ''home country'' pay and benefits. SIA also stated that if it is an employer's practice to have its workers continue to receive ''home country'' benefits when they are on a short-period assignment in the United States, it should be allowed to continue to do so.

Some commenters (ACIP, Intel, Latour) indicated that multinational corporations typically offer similar benefit packages to all their employees. Thus, ACIP stated that ''most employers already provide the same benefits to all workers and do not distinguish between U.S. and foreign nationals.'' At the same time, it noted that ''in dealing with a global workforce, it is sometimes necessary to provide different benefit packages to workers from different countries, depending upon the laws and social services of that country.'' Intel similarly stated that the vast majority of its regular full-time H–1B workers are on U.S. benefits; it noted that a small percentage of these workers are on their ''home country'' pay and benefits. Intel further stated that all its H–1B workers are put on U.S. medical benefits, because of ''out of country'' coverage problems. ACIP explained that currently employers may provide certain benefits to workers depending upon standards in the workers' home countries and the employer's international relocation policies. As stated by ACIP: ''Benefits may include relocation expenses, schooling for children, housing allowance, travel expenses, additional vacation time and assistance with health care or other items the worker is accustomed to receiving.''

ACIP applauded the Department's effort to deal with this issue and supported the Department's statement that ''should the U.S. worker remain on the foreign plan, the U.S. employer will be held responsible for compliance with all H–1B regulations.''

AILA's comment, that flexibility is needed to preserve the ability of the H–1B workers to preserve their existing ''home country'' benefits (which if interrupted could have significant and perhaps long-term negative impact on the worker and the worker's family), was representative of several comments on this point.

The Department has carefully considered the question of application of the benefits requirements of the ACWIA to multinational firms. The Department cannot agree with the construction of the statute that would deprive foreign-based employees of the benefit protections enacted by the ACWIA on the basis that they are not ''similarly employed.'' On the other hand, the Department believes it is appropriate to provide some accommodation for multinational corporate operations where ''home country'' benefits are equitably equivalent to the benefits provided to employees.

The Department has crafted a two-part Interim Final Rule, distinguishing between workers who are in the United States for a short period of time (90 days or less) and workers who are in the United States for a longer period. Where H–1B workers permanently employed in their ''home country'' (or some other country) are not transferred to the United States but remain on the payroll of their permanent employer in their ''home country'' and continue to receive benefits from the ''home country'' without interruption, the Department will require nothing further, provided the worker is in the United States for no more than 90 continuous days in any one visit to the United States. Moreover, the employer must also provide reciprocity to its U.S. workers *i.e.,* U.S. workers based abroad and U.S. workers based in the United States must receive the benefits of their home work station (the station abroad or in the United States, respectively) when traveling on temporary business. It should be noted that this provision would allow H–1B workers who are not in the United States more than 90 continuous days in one trip to go back and forth between countries without any consideration to cumulative days of employment in the United States, provided there is no reason to believe the employer is trying to evade the Act's benefit requirements, such as where a worker remains in the United States most of the year but returns to the home country on brief visits.

Once the H–1B worker has worked in the U.S. for more than 90 continuous days (or from the point where the worker is transferred or it is anticipated that the worker will likely remain in the United States for more than 90 continuous days), the H–1B employer is required to offer that worker the same benefits on the same basis as provided to its U.S. workers unless: (1) The worker continues to be employed on the ''home country'' payroll; (2) the worker continues to receive ''home-country'' benefits without interruption; (3) the ''home-country'' benefits are equitable relative to the U.S. benefit package; and (4) the employer provides reciprocity (*i.e.,* similar treatment as discussed above) to its U.S. workers (if any) on assignment away from their home work station. In the Department's view, this strikes an appropriate balance between meeting the statutory requirement (thereby protecting the benefits of U.S. workers employed in the U.S. against erosion), and protecting the H–1B worker's interest in preserving long-term ''home country'' benefits which may be threatened by the disruption of these benefits.

Furthermore, as Intel noted in its comments, many health care plans fail to provide coverage, or fail to provide full coverage, outside their country's boundaries. Therefore any employer that offers health coverage to its U.S. workers must offer similar coverage (same plan and same basis) to its H–1B workers in the United States for more than 90 continuous days unless the H–1B workers' home-country plan provides full coverage (*i.e.,* coverage comparable to what they would receive at their home work station) for medical treatment in the United States.

In addition, employers will be required to provide H–1B workers who are in the United States more than 90

continuous days those U.S. ''benefits'' which are paid directly to the worker—namely paid vacation, paid holidays, and bonuses. H–1B workers must also be provided working conditions and eligibility for working conditions (hours, shifts, vacation periods, etc.) on the same basis and criteria provided to U.S. workers.

TCS argued that if the Department requires the same or even equivalent benefits for its workers, they will receive double benefits—the U.S. benefits plus their ''home country'' benefits. In the Department's view, TCS is mistaken. The Department's proposal tracks the ACWIA. Neither the proposal nor the statute requires the employer to continue to maintain ''home country'' benefits in such situations. While an employer in such situations, either by contract or otherwise, might be required to maintain such benefits (or it may decide to do so as a matter of company policy), the ACWIA does not impose such an obligation, nor does this rule.

The Department received a number of comments regarding whether a multinational employer continuing ''home country'' benefits to H–1B workers need establish that the benefits provided are equivalent or equitable in relation to benefits provided U.S. workers. ACIP expressed the view that ''it [would be] extremely burdensome to put a dollar value on benefits received.'' Similarly, AILA stated that multinational employers should be able to provide equitable but non-equivalent benefits to H–1B workers. BRI, on the other hand, took the position that benefits should be equivalent, comparing their monetary value. The AFL-CIO, as discussed above, contended that employers should be required to provide identical benefits to H–1B and U.S. workers.

The Department agrees that a multinational firm, under the circumstances described, should not be required to make a valuation of the benefits it offers and provides to U.S. and H–1B workers, but rather should be required, in the event of an investigation, to establish only that it provides benefits which are equitable in relation to U.S. workers' benefits. The Department finds very persuasive the arguments that it is in the workers' interest to allow employers to continue their permanent employees on ''home country'' benefits when working temporarily in the United States. At the same time, the Department believes that establishing benefits in terms of cost is unduly burdensome, and would not further the objective of establishing comparable benefits since there is no reason to believe even identical benefits abroad would cost the same as benefits in the United States.

Only ACIP provided comments on the meaning of the phrase ''equitable benefits.'' ACIP suggested that ''[t]he emphasis should be on whether the benefits package is equitable in light of basic human needs, similarity in treatment of all workers, how U.S. workers transferred abroad are treated, and the facts and circumstances of each H–1B worker.'' ACIP further stated: ''While we agree that the Department should look closely at 'contrived cases,' we stress that the Department should look closely at the facts of each case to determine whether equitable benefits have been provided. * * * [T]he Department should not place undue emphasis on any one factor such as the employee's length of stay in the U.S.''

The Department agrees that ''equitability'' between ''home country'' and U.S. benefits does not reduce to a bright-line test. In the event of an enforcement action, the Department will look into all the circumstances bearing upon the benefits to ensure that the H–1B worker's continued receipt of these benefits is not less advantageous to him than the benefits offered U.S. workers. This examination entails a qualitative rather than a quantitative review. In other words, an employer in these circumstances must be able to demonstrate that the worker's ''home-country'' benefits are equitable in relation to the benefits provided its U.S. workers based in the United States, similarity in treatment of all workers, how U.S. workers temporarily stationed abroad are treated, and the facts and circumstances of each H–1B worker. Where the employer makes this demonstration, and there is no appearance of contrivance to avoid payment of U.S. benefits, the Department will not second-guess the employer.

Several commenters responded to the Department's request for comments on whether it should define ''benefits'' as that term is used in Section 212(n)(2)(C)(viii), which provides that the requirement to offer benefits and eligibility for benefits includes: ''the opportunity to participate in health, life, disability, and other insurance plans; the opportunity to participate in retirement and savings plans; and cash bonuses and noncash compensation such as stock options (whether or not based on performance). * * *''. Senators Abraham and Graham and AILA stated that they did not see the need for further defining ''benefits,'' noting that the statute contains several examples of benefits. ACIP also stated that a regulatory definition was unnecessary, suggesting that instead the Department should examine the facts and circumstances of each case. TCS contended that the statutory list of benefits is exclusive; alternatively, it argued that the Department should specify the benefits so that employers do not have to guess about what is covered—*e.g.,* is a separate office a benefit? ACIP asserted that ''[c]ertain cash and non-cash bonuses considered benefits under ACWIA are considered wages under other laws. Adopting definitions from other laws further confuses immigration law, does not address practices abroad, and may have unintended tax consequences.'' Similarly, ACIP, SHRM and Cowan & Miller commented that further definition of benefits is unnecessary. Rapidigm asked for clarification of the Department's statement.

The Department agrees with the position of most commenters that the existing statutory definition is sufficient to administer effectively this aspect of the statute. The language of section 212(n)(2)(C)(viii) provides a fairly comprehensive list of the benefits that may be offered to workers in the U.S. While the use of ''including'' evinces an intention that the list is not exhaustive, the list, in the Department's view, is representative of the types of benefits that must be considered. Thus, an employer, by analogy, may determine whether other particular benefits should be taken into account. In this regard, the Department notes that the regulatory schemes under other employment-related statutes such as FMLA, the Equal Pay Act, the ADEA, and ERISA also provide guidance in this area. The Interim Final Rule takes this approach in lieu of an attempt to more fully define benefits. Under the Department's approach, it would appear clear that office accouterments—the example used by TCS—ordinarily would not constitute a benefit within the meaning of the statute. At the same time, it bears noting that the ACWIA does not relieve employers from any obligations they may have incurred through collective bargaining or otherwise with regard to particular working conditions, or of its obligation not to discriminate based on citizenship or national origin.

With regard to the Department's stated intention to modify the current regulatory provision concerning the working condition attestation, ACIP, AILA, and TCS expressed the concern that the Department was seeking to impose a new requirement, *i.e.,* that an employer was required to offer benefits to H–1B workers at least equivalent to the higher of those offered to their own U.S. employees or those prevailing in

the area. ACIP asserted that the Department lacks authority to require employers to consider conditions outside their own workforces. Rapidigm requested clarification on the meaning of the provision.

After review of the ACWIA and the provisions of the H–1B program as a whole, the Department concurs with commenters that Congress intended that the requirement for offering benefits and eligibility for benefits to H–1B workers on the same basis and same criteria as they are offered to U.S. workers employed by the employer includes both benefits paid as compensation for services rendered and working conditions. The Department has therefore concluded that it is inappropriate to continue the provision in § 655.732 which provides for consideration under some circumstances of prevailing conditions in the area of employment. Section 655.732 therefore is revised in the Interim Final Rule to clearly require that working conditions be provided to H–1B workers on the same basis and same criteria as they are offered to U.S. workers.

The Department also believes that certain benefits appropriately are in the nature of compensation for service rendered, and have a monetary value to workers and monetary cost to employers. Such benefits include cash bonuses, paid vacations and holidays, and termination pay, which are paid directly to workers and are taxable when earned. Also included are benefits such as health, life and disability insurance, and deferred compensation such as retirement plans and stock options which are funded by employers, either directly as costs are incurred or through contributions to fringe benefit plans or insurance companies. The Department has concluded that such benefits are more in the nature of wages than working conditions, although the Department cautions that only benefits which meet the criteria of § 655.731(c)(2) count toward satisfaction of the required wage since such benefits are not included in surveys used to determine the prevailing wage. On the other hand, benefits which do not have a direct monetary value to workers or cost to employers, are in the nature of working conditions, including matters such as seniority, hours, shifts, and vacation periods, and preferences relating thereto. Sections 655.731 and 655.732 are amended to reflect this distinction.

2. What Documentation Will Be Required? (§ 655.731(b))

The Department proposed to require H–1B employers to retain copies of fringe benefit plans and summary plan descriptions provided to workers, including all rules relative to eligibility and benefits, and documents showing the benefits actually provided and how the costs are shared between the workers and the employer. The Department sought suggestions as to exactly what records would demonstrate the value of benefits and satisfy the other retention requirements. The Department expressed the view that such records already are required for IRS and ERISA purposes (although noting in the paperwork analysis, at 64 FR 630, that a small percentage of employers might be required to keep records that otherwise would not be kept). In connection with the Department's query whether it might be possible to provide different ''home country'' benefits to employees of a multinational corporate operation in lieu of those provided to U.S. workers, the Department sought comment on what records would be necessary to demonstrate the relative value of the ''home-country'' benefits and the benefits provided to U.S. workers.

Many of the commenters opposed the notion of maintaining particular documentation in order to demonstrate compliance with the benefits attestation. ACIP and AILA asserted that the statute does not authorize the Department to require employers to retain documentation, suggesting that it is up to an employer to decide what documentation, if any, it should retain in order to demonstrate its compliance if it is investigated. Similarly, Senators Abraham and Graham stated: ''DOL is not authorized to require employers to maintain any particular documentation.'' The Department cannot, they asserted, include as part of the proposed LCA a ''new attestation'' that ''[the employer] will develop and maintain documentation of working conditions and benefits.''

ACIP addressed particular burdens it perceived in retaining such documentation, noting, for example, that they already maintain such documentation in a location or in a format different than that contemplated by the Department. While ACIP recognized that the Department correctly stated that employers now keep documents related to their fringe benefit plans, ACIP stated that these documents may be housed in various departments and urged the Department to let the employer decide where documentation must be kept. ACIP further explained that much information is sensitive and confidential (*e.g.,* stock option and incentive pay plans), requiring the Department, in its view, to allow an employer flexibility in documenting these benefits.

Intel stated that summary plan descriptions are a U.S. requirement. It noted that no other countries required the same depth and detail regarding the documentation of benefits, though stating that about one-half of its foreign subsidiaries have some benefits documentation. Intel explained that all its employees at orientation receive information regarding the company's benefits; in the U.S., it stated that employees receive a book that describes benefits, and that each year employees receive a particularized benefit portrait. Intel asserted that further documentation should not be required; it contends that a memorandum to the public access file that its employees are advised of the company's benefits at time of their hire should suffice.

Satyam questioned whether current requirements under other statutes and regulations relating to the retention of benefits documents would suffice for H–1B purposes; it suggested that the Department should not require putting specific information in the public access file. It also inquired whether it would be necessary to retain information relevant to the comparison group. ITAA said that the Interim Final Rule should recite rather than refer to IRS and PWBA requirements. AILA expressed the concern that the Department will make it a violation to fail to keep copies of benefits documents in a public access file and that requiring documentation to be kept up front would impose a huge burden. AILA recommended instead that an employer, for example, be simply required to bear the burden of proving the ''equivalency'' of foreign benefits in the event of an investigation.

None of the commenters took issue with the Department's statement that the documents sought are required already by IRS or ERISA.

Based on our review of the comments received on the proposal, it is apparent that the documentation requirements proposed in the NPRM have been misunderstood. With the exception of documentation specifically required to be retained in the public access file, there is no requirement that information be kept in any particular format or place, or that information be segregated by LCA, by locality, by H–1B versus U.S. workers, or in any other way from the employer's records for the entire company.

Nothing in the ACWIA suggests that documentation requirements are unauthorized or otherwise improper. To the contrary, section 212(n)(1) specifically requires employers to make the LCA ''and such accompanying documents as are necessary'' available for public examination. The Department believes that this provision clearly permits the Department to determine what documents must be created or retained by employers to support the LCA. The documentation that is required by the Interim Final Rule simply effectuates the more specific requirements imposed by the ACWIA. Furthermore, as the NPRM stated, the documents sought for the most part are already required by the IRS or ERISA, and would be kept by an ordinary prudent businessman in any event. Thus, the Department's ERISA regulations require at 29 CFR part 2520 that summary plan descriptions be provided to participants, and require employers to submit lengthy forms (Form 5500) to IRS with detailed information regarding their fringe benefits plans, which must be substantiated by records. In addition, EEOC rules under the ADEA, 29 CFR 1627.3(b)(2), require that every employer retain copies of all employee benefit plans, as well as copies of any seniority systems and merit systems which are in writing. Where the plan is not in writing, a memorandum fully outlining its terms and how it has been communicated to employees is required.

The Department believes that it is essential that employers, in order to establish that H–1B workers have in fact been offered the same benefits as U.S. workers (or that the special benefit requirements for certain employees of multinational firms are met), retain a copy of any document provided to employees describing the benefits offered to employees, the eligibility and participation rules, how costs are shared, etc. (*e.g.,* summary plan descriptions, employee handbooks, any special or employee-specific notices that might be sent). It is also important that employers keep a copy of all benefit plans or other documentation describing benefit plans and any rules the employer may have for differentiating among groups of workers. In addition, the employer will be required to retain evidence as to what benefits are actually provided to U.S. and H–1B workers. Where employees are given a choice of benefits, employers will be required to retain evidence of the benefits selected or declined by employees.

For multinational employers who choose to keep H–1B workers on ''home country'' benefit plans, the employer will be required to maintain evidence of the benefits provided to the worker before and after the employee went to the United States. In the event of an investigation, the employer will also be required to demonstrate that the other requirements for multinational firms are met, as appropriate—*e.g.,* that the employer maintains reciprocity by treating U.S. workers coming to the United States temporarily from abroad the same as H–1B workers, and likewise continues U.S. workers temporarily overseas on U.S. benefits, that the worker was not in the United States for more than 90 continuous days, that ''home country'' benefits are equitable in relation to U.S. benefits, etc.

With regard to the public access file, the employer need only maintain a summary of the benefits offered to U.S. workers in the same occupation as H–1B workers, including a statement explaining how employees are differentiated where not all employees in the occupation are offered the same benefits. If an employer has workers receiving ''home country'' benefits, the employer may place a simple notation to that effect in the file. The public access file need not show the proprietary details of a plan (such as a stock option or incentive distribution plan), the costs of providing the benefits, or the choices made by individual workers.

Since the regulations do not allow an employer to provide equivalent benefits as a general matter, and provide an ''equitable'' rather than an ''equivalent'' test for multinational benefits, no special documents regarding the cost of benefits are required.

H. What Does the ACWIA Require of Employers Regarding Payment of Wages to H–1B Nonimmigrants for Nonproductive Time? (§ 655.731(c)(7))

On October 31, 1995, the Department republished for comment a provision of the December 20, 1994 Final Rule which articulated the Department's position regarding payment of the required wage for nonproductive time. This provision, § 655.731(c)(5), required payment of the required wage beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment, including periods when the nonimmigrant is in nonproductive status due to employment-related reasons such as training or lack of assigned work. The provision did not require payment of such wages where the nonproductive status is due to reasons unrelated to employment (*e.g.,* caring for an ill relative), provided the nonimmigrant's unpaid status is acceptable to the INS and is not subject to a wage payment obligation under some other statute (*e.g.,* Family and Medical Leave Act). The provision distinguished between full-time and part-time workers as provided on the I–129 petition filed with INS, but stated that in the event a part-time employee regularly worked a greater number of hours than stated on the I–129, the employer would be held to the actual hours disclosed in the enforcement action. Section 655.731(c)(5) was among the provisions of the December 20, 1994 Final Rule which had been enjoined from enforcement, due to lack of notice and comment, by the court in *National Association of Manufacturers* v. *United States Department of Labor.*

Subsequently, the ACWIA, amending section 212(n)(2) of the INA, enacted an explicit requirement, consistent with the Department's regulation, providing that it is a violation of the wage attestation in section 212(n)(1)(A) for an employer to fail to pay an H–1B worker the required wage for certain nonproductive time. Like the Department's regulation, an exception was created for nonproductive status which is due to non-work-related factors such as the worker's own, fully voluntary request, or circumstances rendering the worker unable to work. Under this provision, workers designated as full-time on the petition filed with INS must be paid full-time wages, and employees designated as part-time on the petition must be paid the hours designated in the petition. This obligation is effective ''after the H–1B worker has entered into employment with the employer,'' but in any event, not later than 30 days after the worker's date of admission to the United States (if entering the country pursuant to the petition) or 60 days after the date the worker ''becomes eligible to work for the employer'' (if already in the country when the petition is approved). The statute also contains a special provision regarding academic salaries which is discussed in IV.I, below.

Congressman Smith and Senator Abraham, in their remarks after enactment of the ACWIA, noted that the most extreme examples of ''benching'' occur when workers are brought to the United States on the promise of a certain wage, but only receive a fraction of that wage because the employer does not have enough work for the H–1B worker. 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S12753–54 (Oct. 21, 1998). They also both agreed that employers must pay full wages and benefits during an H–1B worker's non-productive status when that status is due to the employer's decision—based

on factors such as lack of work for the worker—or due to the worker's lack of a license or permit. Congressman Smith also remarked that Congress anticipated the Secretary's close scrutiny of ''voluntariness'' in circumstances that appear to be contrived to take advantage of unpaid time. Senator Abraham listed the following examples of H–1B employees taking unpaid leave which he stated would not be considered ''benching'': leave under FMLA or other corporate policies, annual plant shutdowns for holidays or retooling, summer recess or semester breaks, or personal days or vacations. Senator Abraham also stated that this provision does not prohibit an employer ''from terminating an H–1B worker's employment on account of lack of work or for any other reason.'' Congressman Smith stated that an attempt by an employer to avoid compliance with the ''benching'' provision by laying off an American worker ''would trigger the enforcement and penalty provisions of the Act.''

Congressman Smith and Senator Abraham agreed that the benching provision is not intended to preclude part-time H–1B employment, agreed to between the employer and the H–1B worker when the worker was hired. 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S12754 (Oct. 21, 1998). Congressman Smith stated that ''the employer's misrepresentation of this material fact should be scrutinized by the Secretary'' in determining whether a benching violation or misrepresentation has been made, with particular attention to whether U.S. workers would receive paid leave for nonproductive time. Senator Abraham stated that the Act is not intended to give the Secretary the authority ''to reclassify an employee designated as part-time based on the worker's actual workload after the employee begins employment.''

In the NPRM, the Department proposed regulatory text which, except for the different statutory language triggering the beginning of the period in which the ''benched'' worker must be paid, is very similar to its current regulation. In the preamble, the Department stated that it was considering whether the H–1B worker ''enters into employment'' when he first makes himself available for work, such as by reporting for orientation or training, or when the worker actually begins receiving orientation or training or ''otherwise performs work or comes under the control of his employer.'' In commenting on the purpose of the ''benching'' provision, the Department observed that an H–1B nonimmigrant is not permitted to be employed by another employer while ''benched'' (unless another employer files a petition on behalf of the worker or the worker adjusts his or her status under the INA), and is without any legal means of support in the country. In contrast, a U.S. worker can seek other employment and would be eligible for Federal programs such as food stamps. The Department also observed that the employer, at any time, may terminate the employment of the worker, notify INS, and pay the worker's return transportation, thereby ceasing its obligations to pay for non-productive time under the H–1B program. The Department proposed that payment of wages would not be required where the nonproductive status is due to reasons unrelated to employment, unless such payment is required by INS as a condition of the worker maintaining lawful status, or is required by some other Act such as FMLA. On the other hand, the employer would not be relieved from the wage obligation for any required leave of absence, even if it includes U.S. workers.

The Department received three comments on the 1995 proposed rule on this issue. Regarding the requirement in the 1995 NPRM that the employer pay the required wage for nonproductive time beginning no later than the first day the H–1B nonimmigrant is in the United States and continuing throughout the nonimmigrant's period of employment, AILA suggested that it would be more reasonable to require the employer to begin paying on the day that the nonimmigrant actually reports to work, provided that the date is no later than 30 days after the date the nonimmigrant enters the U.S. or otherwise becomes eligible to work for the employer. AILA also suggested that an exception be made where the nonimmigrant is given an unpaid leave of absence pursuant to a uniformly-enforced company policy. Similarly, another commenter, an electronics manufacturer (Motorola), complained that in the case of a temporary reduction in force, the employer would have to retain the H–1B nonimmigrant at full salary, while U.S. workers are off the payroll.

The Department received 33 comments on the 1999 NPRM proposals addressing the ACWIA's ''benching'' provisions. APTA stressed the importance of the Department ensuring that H–1B nonimmigrants are aware of their wage rights for nonproductive time. Miano commented that companies should not be allowed to use the H–1B program to create stables of available employees in anticipation of openings that do not yet exist, but should be required to demonstrate that an unfilled position actually exists.

The Department agrees that it is important that H–1B nonimmigrants be aware of their rights. For this reason, § 655.734(a)(3) requires that all H–1B nonimmigrants be provided a copy of the LCA which supports their petition. In addition, the Department is planning a comprehensive educational program, as discussed in III.B, above.

AILA suggested that the Department add to its list of exceptions situations where objective economic reasons are present, such as annual retooling in the automobile industry for production model changes. ACIP and SIA urged the Department to adopt Senator Abraham's October 21, 1998 comments as examples of what is not benching, *i.e.* leave under the Family and Medical Leave Act; or other corporate policies for no payment such as annual plant shutdowns for holidays or retooling, summer recess or semester breaks, or personal days or vacations. ACIP also urged that similar situations be included in the list of examples which do not constitute benching, such as disciplinary action, mandatory unpaid pre-employment training or orientation, mandatory vacation leave, and periods of downturn where all workers are treated the same. ACIP suggested that the facts and circumstances of each case be considered, including whether similarly-situated U.S. workers are placed on leave and whether H–1B workers knew before accepting employment of the possibility of such leave. ACIP and SIA encouraged the Department to exercise flexibility to avoid the potential effect of companies laying off U.S. workers to avoid the benching of H–1B workers by allowing for periods attributable to regular, objective business occurrences such as cyclical business downturns, holiday plant shutdowns, and plant retooling. They observed that when these events occur all workers are treated equally, according to the same standards.

The AFL–CIO and other commenters observed that the provision's prohibition against ''benching'' may lead employers to treat H–1B employees better than U.S. workers, and may create the situation where an employer retains an H–1B worker over an American worker during a lay-off to avoid paying full wages to the H–1B worker. The AFL–CIO stated its belief that U.S. workers who are laid off to avoid the benching provision may have grounds for a discrimination complaint based on nationality and immigration status and that the regulation should so indicate.

The Department believes that the statutory language is clear. The statute

requires payment, after a nonimmigrant has entered into employment with an employer, whenever nonproductive status is due to a decision by the employer or to the nonimmigrant's lack of a permit or license. In contrast, payment is not due when the nonproductive time is due to non-work-related factors, such as the voluntary request of the nonimmigrant for an absence or circumstances rendering the nonimmigrant unable to work. Therefore the Department cannot interpret the Act to allow employers to be relieved from payment for periods where the employer's business is shutdown, regardless of whether it affects U.S. workers as well, whether for economic downturn, annual retooling, or holiday shutdown; nor can the employer be relieved from liability for mandatory vacation, pre-employment training, or disciplinary action. All of these situations are caused by the employer, rather than at the voluntary request of the nonimmigrant. The Department notes that training or orientation required of an employee before productive work starts has always been considered compensable time under the Fair Labor Standards Act, and that the Department has required payment for such time in its enforcement of the H–1B attestation requirements since the injunction entered in the NAM litigation. If an employer finds need to discipline an H–1B nonimmigrant, it must find a method other than loss of pay, or it may terminate the employment relationship.

The Department understands the concern expressed regarding the possibility of an employer laying off U.S. workers while continuing to pay H–1B workers because of its obligation to continue paying H–1B workers during periods of nonproductive status. Congressman Smith suggested that an employer's action in laying off U.S. workers to avoid placing H–1B workers in nonproductive status for which they must be paid would be a violation of the ACWIA. We agree, with respect to H–1B-dependent employers and willful violators, where the required showing for a prohibited displacement under section 212(n)(1)(E) or (F) is made. In addition, we note that a displacement in connection with a willful violation of the attestation requirements or a willful misrepresentation can bring enhanced penalties pursuant to section 212(n)(2)(C)(iii). Additionally, other laws provide U.S. workers with rights and remedies for an employer's discriminatory practices. The names, telephone numbers, and websites of the three federal agencies responsible for enforcement of anti-discrimination laws are set forth in IV.E.4, above.

The Department notes that—in determining whether the statutory criteria have been met, including the exception for nonpayment based on ''the voluntary request of the nonimmigrant for an absence''—it will look closely at any situation where there is any question about whether the period of nonproductive time is truly voluntary. The Department will not under any circumstances consider the employer to be relieved of wage liability where there is a plant shutdown. Nor will the Department relieve an employer from liability simply because the employee agreed to periods without pay in the employment contract.

ACIP and AILA questioned the basis for the Department's proposed requirement that workers be paid where required by other statutes such as FMLA or the ADA, and that the worker's period of unpaid leave be consistent with maintenance of status under INS regulations.

The Department intended to say nothing more than that an employer must comply with other laws. The Department notes that FMLA only requires paid leave where the employer has a paid leave plan and either the employer or the employee wishes to substitute the paid leave for unpaid FMLA leave. Since the employer is required to offer H–1B workers the same benefits as U.S. workers, an employer would be required to provide H–1B workers with paid leave under any circumstances in which it is provided to U.S. workers. Enforcement of this requirement during periods where the employee voluntarily takes leave or is unable to work, is in accordance with the benefit obligations at section 212(n)(2)(C)(viii). The Department also wishes to point out, as stated by both Senator Abraham and Congressman Smith, that during periods of nonproductive time, employers are required to provide fringe benefits as well as wages.

ACIP and AILA agree with the proposal that an employer may choose to terminate an H–1B worker without violating the benching provision. ACIP also suggests that employers should not be held liable for the nonimmigrant's failure to leave the country.

The Department agrees that an employer is no longer liable for payments for nonproductive status if there has been a *bona fide* termination of the employment relationship. The Department would not likely consider it to be a *bona fide* termination for purposes of this provision unless INS has been notified that the employment relationship has been terminated pursuant to 8 CFR 241.2(h)(11)(i)(A) and the petition canceled, and the employee has been provided with payment for transportation home where required by section 214(E)(5)(A) of the INA and INS regulations at 8 CFR 214.2(h)(4)(iii)(E). In accordance with current INS policy (see 76 *Interpreter Releases* 378), once an employer terminates the employment relationship with the H–1B nonimmigrant, regardless of any arrangements for severance pay or benefits, that H–1B employee must either depart the United States upon termination of his or her services, or seek a change of immigration status for which he or she may be eligible. Therefore, under no circumstances would the Department consider it to be a *bona fide* termination if the employer rehires the worker if or when work later becomes available unless the H–1B worker has been working under an H–1B petition with another employer, the H–1B petition has been canceled and the worker has returned to the home country and been rehired by the employer, or the nonimmigrant is validly in the United States pursuant to a change of status.

Commenters also offered their views on the phrase ''entered into employment,'' one of the alternative triggers for an employer's obligation to pay the H–1B worker wages during periods of nonproductive status. The Department proposed that this term means the date when the H–1B worker makes himself/herself available for work, *e.g.,* reports for orientation or training, performs work for the employer, or is under the control of the employer. One attorney-commenter (Hammond) expressed appreciation for this ''bright line test'' and described the 30–day allowance as reasonable.

The Department received twenty essentially identical comments on this issue from individuals who urged payment of wages to nonimmigrants immediately on their arrival to the United States. The AEA suggested that the H–1B visa holder be given a firm starting date from his/her employer and that wages start from that date. AOTA commented that ''entered into employment'' should mean when the nonimmigrant makes himself or herself available for work. ACIP urged the Department to look at the facts of the case, but urged as a general matter that an H–1B worker has entered into employment when he or she has reported to the worksite, has been placed on the payroll, and has completed an I–9 form; ACIP stated that H–1B workers should not be required to be paid for short periods of unpaid

training or orientation or medical examinations, since U.S. workers are not. AILA suggested that ''entered into employment'' occurs when the employee actually commences the orientation, training or work because ACWIA, in mandating payments by the 30–day and 60–day deadlines, appears to provide the employer with discretion regarding the starting date prior to those deadlines.

The statutory language does not permit the Department to define the term ''entered into employment'' as the date the H–1B worker arrives in the United States. Likewise, payment of wages by the employer cannot be required before the H–1B petition is approved. On the other hand, the Department notes that the Fair Labor Standards Act itself requires that where there is an employment relationship (including where the worker has been promised employment, even if the employee is not yet on the payroll), both H–1B and U.S. workers be paid for orientation or training time required by the employer.

The Department has concluded that the term ''entered into employment'' means the date on or after the date of need on the H–1B petition when the worker makes himself or herself available for work or otherwise comes under the control of the employer and includes all activities thereafter, such as waiting for an assignment, going to an interview or meeting with a customer, attending orientation, studying for a licensing examination.

Several employers, attorneys and organizations also commented on the meaning of the phrase ''eligible to work for the employer.'' (Sixty days thereafter an H–1B nonimmigrant already in the United States legally under another visa (*e.g.,* F–1 student visa) or on another H–1B visa with another employer must be paid for nonproductive time, even if the H–1B nonimmigrant has not yet entered into employment.) One law firm (Hammond) encouraged flexibility on the 60–day test. An employer (BRI) urged that ''eligible to work for the employer'' should be based on the agreement of employment terms between the employer and employee and determined by the date an employment agreement is entered into between the employer and employee or the completion of the visa process, whichever comes last.

ACIP and Intel requested a specific exception from the benching regulations for export control licenses. ACIP explained that an employee who awaits a license to practice his or her profession in the United States, and is subject to the ACWIA benching provisions, is distinguishable from an export control license which must be procured by an employer in a process which can take three to six months. Therefore, ACIP suggested that the rule provide that where an export license and H–1B petition were filed concurrently but the export license is not approved within the 60–day window, the employer has an additional 90 days to obtain the license before being required to rescind the H–1B petition or pay the worker.

The Department continues to believe that an employee is eligible to work on the date of need stated in the petition, provided that the petition has been processed and the employee has either received a visa or had his/her status adjusted (where the employee is in the United States). The Department sees no basis for any exception based on the export control license. Clearly the employee is legally eligible to work, but work is simply not available (even if due to circumstances beyond the employer's control). The Department agrees that a worker need not be compensated if the H–1B nonimmigrant voluntarily chooses not to make himself or herself available for work, such as where the nonimmigrant has not yet finished school or chooses to remain with another employer in order to finish a project. In each case, although the H–1B nonimmigrant is eligible to work for the employer, he or she need not be paid because of the nonimmigrant's voluntary action. The Department notes, however, that the nonimmigrant may be out of status if he or she does not report to work on the date of need.

In response to the NPRM's proposals on nonproductive pay for part-time workers, Senators Abraham and Graham and AILA objected to the regulatory language requiring workers be paid for hours that exceed the part-time number of hours on the INS petition where in practice the worker regularly works a longer schedule. AILA seeks to allow an employer which has less work than anticipated after filing an I–129 petition for full-time work, to secure approval of a new I–129 petition for part-time work, after which the employer is obliged to pay only for the part-time work.

In addition, Latour commented that the traditional 40-hour week is rapidly changing. It stated that some firms engage workers to perform a project which is completed in less than a year, and then the worker has several months off and may ''moonlight'' at a second job (presumably under a second petition). Latour assumed this practice would be considered ''part-time,'' and suggest that DOL focus on three issues in determining if there is a violation of the ''benching'' provision: (1) Whether the prevailing wage is being paid; (2) whether the worker is making a plausible living; (3) whether the nature of the employment schedule is usual and reasonable for the type of work.

The Department agrees that nonproductive pay is based on the number of hours per week on the H–1B petition. The LCA has therefore been amended to alert employers that their H–1B employees should not regularly work more than the number of hours shown on the petition, which may be expressed as a range of hours. If the H–1B worker normally works full-time or a greater number of hours than shown on the petition, the Department will examine the facts and circumstances and charge the employer with misrepresentation where appropriate. In light of the importance of the distinction between part-time and full-time employment for purposes of the employer's wage obligations, the Department has modified the proposed LCA form to specify that the employer is to designate that the position(s) covered will be either part-time or full-time; a combination of part-time and full-time positions cannot be entered on a single LCA form.

The Department cautions employers that time spent in training or studying to get a license is ordinarily compensable hours worked under the Fair Labor Standards Act without regard to any rules on payment for nonproductive time under the H–1B program.

The Department agrees with AILA's comment that an employer may secure approval of a new H–1B petition for part-time work, after which the employer is obliged to pay only for the part-time work. The nonproductive pay computation is based on the petition that is in effect at the time the H–1B worker is in nonproductive status. Correspondingly, before INS approves a new petition that changes the work time (part-time to full-time or vice versa), the employer will need to file a new LCA that reflects the change.

Finally, the Department disagrees that the scenario described by Latour is part-time work. Rather, it is full-time work with periods where no work is available due to actions of the employer, rather than the employee. This period of non-productive work must be paid unless the worker is temporarily unable to return to work because of alternate commitments or other factors within the control of the employee.

I. What Special Rule Does the ACWIA Provide for Academic Salaries? (§ 655.731(c)(4))

The ACWIA provision on non-productive time (''benching'') (discussed in IV.H, above) has a special rule permitting ''a school or other education institution'' to apply an established salary practice which might result in an H–1B worker appearing to be ''unpaid'' for some part of a calendar year. *See* Section 212(n)(2(C)(vii)((V) of the INA as amended by the ACWIA. Specifically, that provision allows an education institution to disburse an annual salary to its H–1B workers and U.S. workers in the same occupational classification over fewer than 12 months if: (1) The H–1B worker agrees to the compressed annual salary payments prior to commencing payment, and (2) the salary practice does not otherwise cause any violation of the H–1B worker's authorization to remain in the United States.

Congressman Smith and Senator Abraham both explained that this provision ''is intended to make clear that a school or other educational institution that customarily pays employees an annual salary in disbursements over fewer than 12 months may pay an H–1B worker in the same manner without violating clause (vii), provided that the H–1B worker agrees to this payment schedule in advance.'' 144 Cong. Rec. E2326 (Nov. 12, 1998); 144 Cong. Rec. S1275 (Oct. 21, 1998). Congressman Smith explained that Congress ''specifically limited this exemption to schools and educational institutions in recognition of their unique salary patterns.'' 144 Cong. Rec. E2326. Senator Abraham, on the other hand, stated:

> Because Congress is not aware of all the possible kinds of legitimate salary arrangements that employers may establish, the situation covered by subclause (V) may be merely illustrative of other kinds of legitimate salary arrangements under which an employee's rate of pay may vary. Accordingly, so long as an H–1B worker is not being singled out by such a salary arrangement, it is not Congress's intent that such a salary arrangement be treated as suspect under or violative of clause (vii) merely because there is no special provision like subclause (V) addressing it. To the contrary, if it is an arrangement that the employer routinely uses with U.S. employees as well as H–1B workers, it should be treated as presumptively not a violation of that clause.''

144 Cong. Rec.S1275 9 (Oct. 21, 1998).

The one commenter on this provision, ACE, urged the Department to follow the law as written with no further regulation.

As the Department explained in the NPRM, the Department believes that this provision is directed to the common practice by which colleges, universities, and other educational institutions disburse faculty salaries over a nine-or ten-month period, with no salary payments during the summer, between academic quarters, or over some other period during which the faculty member may be away from the institution. As the statute provides, this special rule applies only to schools and other educational institutions. Any attempts to apply the more general definition of organizations to which the special prevailing wage requirements apply (see section 212(p)(1) of the INA as amended by the ACWIA) would change the statutory mandate. The Department has concluded that the NPRM properly implements the statutory mandate and will adopt the provision as proposed.

J. What Actions or Circumstances Would be Prohibited as a ''Penalty'' on an H–1B Nonimmigrant Leaving an Employer's Employment? (§ 655.731(c)(10)(i))

Section 212(n)(2)(C)(vi)(I) of the INA as amended by the ACWIA prohibits an employer from ''requir[ing] an H–1B nonimmigrant to pay a penalty for ceasing employment with the employer prior to a date agreed to by the nonimmigrant and the employer.'' This section requires the Department to ''determine whether a required payment is a penalty (and not liquidated damages) pursuant to relevant State law.'' As discussed in Sections L and M of the NPRM, section 212(n)(2)(C)(vi)(III) provides that the Department, after notice and opportunity for a hearing, ''may impose a civil money penalty for each such violation and issue an administrative order requiring the return to the [H–1B worker] of any amount paid in violation * * *, or if [the H–1B worker] cannot be located, requiring payment of any such amount to the general fund of the Treasury.''

Senator Abraham explained:

> New clause (vi)(I) * * * directs that the Secretary is to decide the question whether a required payment is a prohibited penalty as opposed to a permissible liquidated damages clause under relevant State law (*i.e.* the State law whose application choice of law principles would dictate). Thus, this section does not itself create a new federal definition of ''penalty'', and it creates no authority for the Secretary to devise any kind of federal law on this issue, whether through regulations or enforcement actions.''

144 Cong. Rec. S12752 (Oct. 21, 1998). Congressman Smith further explained that ''[t]his provision was added because of numerous cases that have come to light where visa holders or their families were required to make large payments to employers because the worker secured other employment.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

In the NPRM, the Department proposed to prohibit employers from attempting to enforce any such liquidated damages provisions without first obtaining a State court judgment ordering the H–1B worker to make such a payment. The Department explained its view that State courts were better versed than the Department to resolve State law questions posed by such matters. The Department also stated its intention to make it clear that employers cannot collect the additional $500 petition fee in the guise of liquidated damages, and noted its concern that some employers might attempt to collect liquidated damages in situations where the employers' unlawful conduct may have caused the H–1B worker to prematurely leave the employment.

A number of commenters responded to the Department's proposals on this issue. Two commenters (Latour, Padayachee) endorsed the approach taken in the NPRM. Padayachee also expressed the view that only quantifiable liquidated damages should be claimable. A third commenter (TCS), generally agreed with the Department's approach, although noting some specific objections as identified below.

The view most frequently expressed by other commenters was that the Department's approach was contrary to the intent of the ACWIA. These commenters (Senators Abraham and Graham and other Congressional commenters, ACIP, AILA, and other employers and employer representatives) viewed the proposal as inconsistent with the role intended for the Department under the ACWIA, *i.e.*, to determine whether or not a specific liquidated damages provision is legal under State law. Nallaseth and SBSC asserted that it would be discriminatory to require employers to first secure a State court judgment in enforcing an agreed damages provision against an H–1B worker when none is required to enforce a similar provision involving a U.S. worker. While some commenters recognized that the Department's concern about the difficulty of identifying and applying State law to a particular dispute was well-founded, it was their view that Congress intended the Department, not the State courts, to shoulder this burden. Senators Abraham and Graham asserted that the proposal that an employer obtain a State court judgment as a precondition to enforcing its contractual agreement—a practice,

they stated, they were not aware of under any State's law—constituted an attempt by the Department to create federal law on this question in contravention of the statute's direction that State law was to be applied in resolving such matters. They stated that it was the intention of Congress not to require litigation over each such agreement, but instead to allow the Department to bring an enforcement action if it believes an agreement is punitive as a matter of State law.

Congressional commenters and Network Appliance objected to any requirement that employers obtain a state court judgment where there is no disagreement between the parties. ACIP asserted: ''Requiring a state court judgment to enforce any part of a contract is an unreasonable intrusion upon the ability of parties to contract and limits their ability to settle disputes through mediation, arbitration or other forms of alternative dispute resolution. * * * [A]lthough we agree that individual state courts are much better versed in this area of their law for their state than the Secretary, it clearly was not Congress' intent to impose such a high burden on employers.'' TCS, on the other hand, asserted that a State court judgment should be a prerequisite to any finding of a violation by the Department, limiting its objection primarily to the Department's proposal that a State court judgment must be obtained, even where there is no dispute by the parties or they choose to resolve the dispute by settlement or otherwise.

As an alternative to the Department's proposal, ACIP, AILA, and SIA suggested that the regulation set forth examples of acceptable reimbursements and examples of prohibited penalties. AILA and TCS requested that the Department prohibit any class-based complaint or relief in the administrative proceeding, *i.e.,* to limit the relief to the particular H–1B worker who initiated the complaint. In a similar vein, AILA and ACIP argued that whether a provision is a penalty or liquidated damages should be inferred from the facts and circumstances of the case; thus the fact that a penalty is found in one case does not automatically mean all similar provisions are void. TCS asserted that the Department should adopt a rule that an employer cannot be held in violation of the ACWIA unless a State court first holds that an agreed damage provision is a penalty, and, that even where a State court so holds, the Department should not find an employer in violation unless it fails to cure the violation within a reasonable amount of time.

TCS also objected to any required notice to employees that would suggest that an employer's ability to enforce a damages provision contained in the employment contract is limited, expressing concern that such notification would encourage H–1B workers to disregard their contractual obligations. AILA encouraged the Department to avoid a presumption that any ''agreed damage'' is an unenforceable penalty. ACIP objected to the Department's statement that it would examine ''attempts by employers to collect damages where their violations of the INA [the H–1B program], or other employment law may have caused the H–1B worker to cease employment''—apparently viewing this statement as suggesting that employers might contrive to get workers to quit their employment in order to collect contract damages.

Notwithstanding the Department's continued reluctance to identify and interpret State law, the Department now concurs with the view that Congress intended the Department to determine whether a provision is liquidated damages or a penalty. For the same reason, it believes there is no merit to the suggestion by TCS that the Department cannot find that an employer has violated the ACWIA's bar against punitive damages, unless a State court first rules that a violation has occurred. Furthermore, the Department agrees that it is unnecessary to obtain a court judgment or a ruling from the Department of Labor if an employee pays voluntarily or the matter is settled. The Interim Final Rule reflects the Department's revised position on this question.

Under the Interim Final Rule, a complaint regarding an alleged attempt to enforce a penalty provision will be processed and investigated in the same way as other complaints by aggrieved parties under Subparts H and I. Thus, an individual who believes that an employer has sought to enforce a penalty provision should file a complaint with the Wage and Hour Administrator. After investigation, Wage and Hour will issue a determination in accordance with its analysis of the relevant State law, and, where violations are found, may assess a civil money penalty of $1,000 for each violation and order the return of any money paid by the worker(s) to the employer (or, if the worker(s) cannot be located, to the U.S. Treasury). A party aggrieved by Wage and Hour's determination may request a hearing before an ALJ; a party may obtain review of the ALJ's determination by the Department's Administrative Review Board.

The Department agrees with the suggestion that the regulations contain some of the general principles applied in resolving whether a provision is a permissible liquidated damages provision or an impermissible penalty. It is drawn primarily from two legal reference publications (American Jurisprudence 2d; Restatement (Second) Contracts) that provide a general discussion regarding the differences between liquidated damage and penalty provisions. However, the decisional and statutory law of a particular State, as applied to the particular circumstances relating to the employment and contract at issue—not these general principles—will control the resolution of most disputes. Furthermore, we do not address other legal remedies that may be available to the parties to recover damages for an alleged breach of the employment agreement—matters outside the Department's charge under the ACWIA. Individual State law also will determine the particular state whose law will apply to the dispute, where significant aspects of the contract and employment relationship involve different States (or nations).

The Department has also incorporated into the Interim Final Rule its proposal to examine attempts by employers to collect damages where violations of employment law may have caused the H–1B worker's premature termination of his or her employment. It is the Department's expectation that where there is a constructive discharge, or the employer has committed substantive violations of the H–1B provisions directly impacting on the employee (such as wage and benefit violations), State law would not permit the employer to collect the payment.

The Department reiterates the point it made in the NPRM that, although State law will govern the enforceability of liquidated damage provisions in agreements, an H–1B employer nevertheless must comply with the requirements of Federal statute and regulation bearing upon the H–1B employment relationship. For example, irrespective of any contractual agreement to the contrary, an employer is prohibited from directly or indirectly allocating any of the $500 LCA fee (recently increased to $1,000) or other employer expenses to the H–1B worker (see Section 212(n)(2)(C)(vi)(II)). Thus an employer is barred from directly withholding the $500 or $1,000 fee from the H–1B worker's pay or from indirectly collecting the fee through a liquidated damages provision in the contract. The Department agrees that

liquidated damages may encompass other costs the employer has borne on behalf of the employee, such as transportation and visa processing assistance. Employers should be aware that liquidated damages may be withheld from the required wage only if permitted under the criteria for allowable deductions at 20 CFR 655.731(c)(7).

With regard to the suggestion that the Department issue a rule limiting the relief available to the particular worker rather than allowing a particular determination to affect other cases or other workers, the Department will apply principles of administrative collateral estoppel (the legal principle limiting consideration of a dispute to only one court action), where appropriate, just as it would for any other employment law violation.

The Department sees no merit to the proposal by TCS that an employer may be held in violation of the ACWIA' s punitive damages bar only where it fails to cure the violation within a reasonable time after a determination that an agreed damages provision is an unenforceable penalty. There is nothing in the language of the statute to suggest that penalties under this provision should be assessed differently than penalties under other provisions.

K. What Standards Apply To Determine If an Employer Received a Prohibited Kickback of the Additional $500/$1,000 Petition Filing Fee From an H–1B Worker? (§ 655.731(c)(10)(ii))

The ACWIA prohibits an employer from ''requir[ing] an alien who is the subject of a [visa] petition * * * for which a fee is imposed under section 214(c)(9), to reimburse, or otherwise compensate, the employer for part or all of the cost of such fee. It is a violation for such an employer otherwise to accept such reimbursement or compensation from such an alien.'' The referenced filing fee is the ACWIA-enacted filing fee applicable to H–1B petitions, which is in addition to any other fees imposed by INS for filing H–1B petitions. The fee was created by the ACWIA, in the amount of $500; the October 2000 Amendments increased the fee to $1,000. The H–1B worker is not, in any manner, to pay or absorb the cost of any of the additional fee.

Senator Abraham explained that new clause (vi)(II) ''prohibits employers from requiring H–1B workers to reimburse or otherwise compensate employers for the new fee imposed under new section 214(c)(9), or to accept such reimbursement or compensation.'' 144 Cong. Rec. S12752 (Oct. 21, 1998); see also, 144 Cong. Rec. E2325 (Nov. 12, 1998). Congressman Smith explained that ''Congress included this provision to make it very clear that these fees are to be borne by the employer, not passed on to the workers.'' *Id.*

The proposed rule stated that the employee is not to be forced, encouraged, or permitted to rebate any part of the filing fee to the employer, directly or indirectly, *e.g.,* through an intermediary such as an attorney, relative, or co-worker.

The Department received three comments on this issue. All the commenters agreed that the statute prohibits employers from accepting reimbursement from the H–1B worker for the filing fee.

AILA asserted that not all third-party reimbursements are prohibited (*e.g.,* joint employment arrangements, cooperative or joint ventures). The Department agrees that the statute does not prohibit payment of the filing fee by a third party, nor does it require payment only from the employer. However, the Interim Final Rule does prohibit third-party payment if the third party receives or asks for reimbursement from the alien. The employer is held accountable even if it is a third party which violates the statute.

The AFL–CIO asserted that the Department should state specifically that deductions from the alien's wages will be scrutinized to prevent subterfuge for repayment of the filing fee. The Department intends to be alert to abuse or subterfuge. The Interim Final Rule makes it clear that deductions to cover the fee are not allowed, even if the H–1B worker's pay is higher than the required wage.

A third commenter (ITAA) contended that the Department does not have the authority to prohibit the alien from paying the expenses other than the filing fee. This issue regarding other expenses is discussed at § 655.731(c)(7) and Section P.3 of the NPRM, concerning allowable deductions from the required wage.

The Department has determined that the NPRM properly implements the statutory mandate that the employer not force, encourage, or permit an employee to rebate any part of the fee back to the employer or a third party, directly or indirectly, including payments through an intermediary such as an attorney, relative or co-worker. The Interim Final Rule, therefore, embodies the proposed rule. In addition, the Interim Final Rule takes into account the increased petition filing fee, enacted by the October 2000 Amendments. The Rule prescribes that for H–1B nonimmigrants admitted on petitions filed prior to December 18, 2000, the fee ''kickback'' prohibited by this statutory provision is $500 (the amount of the filing fee as created by ACWIA), and that for nonimmigrants admitted on petitions filed on or subsequent to December 18, 2000, the prohibited fee ''kickback'' is $1,000 (the increased fee enacted by the October 2000 Amendments). In the event of an investigation, the Administrator will determine the amount of the statutorily-prohibited ''kickback,'' based on the filing date of the petition.

L. What Penalties and Remedies Apply If the Employer Imposes an Impermissible Penalty or Receives an Impermissible Rebate? (§ 655.810)

The ACWIA enforcement provision on early termination penalties and filing fee kickbacks is self-contained and provides its own sanctions authority. The Department may impose a civil monetary penalty of $1,000 for each violation, whether willful or non-willful, and may order the employer to reimburse the worker (or the Treasury, if the worker cannot be located) for any such payment. The ACWIA provision does not authorize debarment for the penalty and kickback violations.

The Department proposed to adopt the ACWIA language verbatim. Three commenters (ACIP, AILA, TCS) encouraged an express provision prohibiting any class-based relief or res judicata effect and limiting an administrative finding of penalty and corresponding remedy to the particular H–1B worker for whom the violation was found. As discussed in IV.J, above, the Department will follow traditional principles of administrative collateral estoppel, if applicable, as it does under other employment laws.

The Interim Final Rule adopts the statutory language without further elaboration.

M. How Did the ACWIA Change DOL's Enforcement of the H–1B Provisions? (Subpart I)

Section 212(n)(2) of the INA as amended by the ACWIA provides specific authority to undertake ''random'' investigations of employers found to have previously violated their H–1B obligations and to undertake investigations of employers, in limited circumstances, based on information received from other sources that otherwise would be unable to submit complaints as aggrieved parties. The ACWIA also provides explicit employee whistleblower protections and enhanced monetary and debarment sanctions against employers who willfully violate H–1B requirements. The Department proposed to modify Subpart I of the current regulations to

reflect these additional provisions, integrating them into the existing regulatory scheme.

1. What Changes Has the ACWIA Made in the DOL's Enforcement Based on Complaints From ''Aggrieved Parties''? (§ 655.715)

Section 212(n)(2) of the INA as amended by the ACWIA, states that ''nothing in this subsection shall be construed as superseding or preempting any other enforcement-related authority under this Act * * *'' Senator Abraham and Congressman Smith both explained that this provision ''clarifies that none of the enforcement authorities granted in subsection 212(n)(2) as amended should be construed to supersede or preempt other enforcement-related authorities the Secretary of Labor or the Attorney General may have under the Immigration and Nationality Act or any other law.'' 144 Cong. Rec. S12755 (Oct. 21, 1998); 144 Cong. Rec. E2329 (Nov. 12, 1998). For this reason, and because the ACWIA did not by its terms purport to amend the Secretary's authority to investigate based upon complaints from an ''aggrieved party'' or the Secretary's regulations defining ''aggrieved party,'' the Department proposed no changes to the existing regulation defining ''aggrieved party'' at § 655.715. Accordingly, any changes to those regulations would be outside of the scope of this rulemaking.

Two comments were received regarding the issue of ''aggrieved party.''

AILA asserted that a fair reading of ACWIA suggests that governmental entities other than DOL should be removed from the current regulatory definition of aggrieved party and should instead present ''other source'' claims. The U.S. Department of State stated that requiring the Department of State to submit information only as an ''outside source,'' with the compelling standard required by section 212(n)(2)(G), discussed below, would be a mistake, as it could limit the effect of what could be an excellent source of information, and would therefore be detrimental to the effectiveness of the H–1B category.

The Department has consistently defined ''aggrieved party'' to include ''a government agency which has a program that is impacted by the employer's alleged non-compliance with the [LCA].'' 20 CFR 655.715. The State Department is an aggrieved party, for example, because its mission is adversely affected if H–1B petitions are erroneously granted. Because of the responsibility of consular officers to reject visa applications of anyone the officer ''knows or has reason to believe * * * is ineligible to receive a visa'' (8 U.S.C. 1201(g); 22 CFR 41.121(a)), the State Department would be required to expend its own investigative resources to ferret out illegal practices visa by visa if it did not provide information to the Administrator. Similarly, the State Department is required to withhold the granting of a visa and exclude the alien from the U.S. if it determines that the alien will become a public charge (8 U.S.C. 1182(a)(4); 22 CFR 40.41)—a possibility that increases significantly if an employer fails to pay its H–1B worker the required wage. Many of these violations would otherwise go undetected because of the inclination of H–1B workers and their employers to hide such matters from INS and the Labor Department.

Therefore the Department has made no change in the definition of ''aggrieved party.'' However, the Department will not consider information contained on the LCA or associated petition(s), including the documentation supporting the petition, to be the sole basis of a complaint under section 212(n)(2)(A) while section 212(n)(2)(G) remains in effect.

2. What Procedures Does the ACWIA Provide for Random Investigations? (§ 655.808)

Section 212(n)(2)(F) of the INA as amended by the ACWIA authorizes random investigations of employers found by the Secretary, after the ACWIA's enactment on October 21, 1998, to have committed a willful failure to meet an LCA condition or a willful misrepresentation of material fact on an LCA. The statute authorizes such random investigations over a period of five years, beginning on the date of the willful violation finding. The same special scrutiny exists where an H–1B-dependent employer or willful violator is found by the Attorney General to have willfully failed to meet its obligation under section 212(n)(1)(G)(i)(II) to offer a job to an ''equally or better qualified'' U.S. worker. The requirements of section 212(n)(2)(A) regarding investigation of complaints are not applicable to these random investigations.

Senator Abraham observed that this provision adds a new section 212(n)(2)(F) granting the Secretary authority to conduct random investigations of employers found after enactment of this act to have committed a willful violation or willful misrepresentation for five years following the finding. 144 Cong. Rec. S12754 (Oct. 21, 1998). Congressman Smith explained that this authority is ''in addition to the existing investigative authority in section 212(n)(2)(A), as heretofore exercised by the Secretary.'' 144 Cong. Rec. E2327 (Nov. 12, 1998).

The Department proposed that the date of the willful violation ''finding'' (which invokes the ''random investigation'' authority) would be the date of the agency's final determination of a violation for debarment purposes. 20 CFR 655.855(a); 59 FR 656757 (Preamble to the Final Rule). Although the NPRM proposed this interpretation, the Department sought comment on whether an earlier date, such as that of the Administrator's investigation finding or an ALJ's finding would be appropriate.

Three comments were received relating to the proposed regulation on random investigation authority.

IEEE expressed strong support for the new random enforcement provision in ACWIA and recommended that the regulations not be written or interpreted so strictly as to effectively prevent the Department from exercising this authority. Malyankar suggested directly surveying H–1B workers themselves at short intervals to determine how the program is being used and to detect possible abuses.

AILA responded that only final action finding a willful violation or willful misrepresentation should trigger its authority to conduct random investigations.

The Interim Final Rule, consistent with the AILA suggestion and the manner in which the current regulations address other Secretarial ''findings,'' states that a willful violation ''finding'' within the meaning of the statutory provision occurs when the administrative review process is completed, as described in § 655.855(b) of the regulations.

3. What Procedure Does the ACWIA Provide for Investigation Arising From Sources Other Than Aggrieved Parties? (§ 655.807)

Section 212(n)(2)(G) of the INA as amended by the ACWIA authorizes the Secretary to investigate possible violations based on information provided to the Department by sources other than aggrieved parties. The Department may, upon personal certification by the Secretary, undertake an investigation under this authority when it receives specific credible information that provides reasonable cause to believe that a particular type of violation has occurred. The types of violations covered are: A willful failure to meet statutory conditions relating to wages, working conditions, a strike/lockout, and the displacement and recruitment provisions applicable to dependent employers and willful

violators. In addition, such an investigation may be undertaken where the information provides reasonable cause to believe that the employer has engaged in a pattern or practice of failures to meet any of these conditions; or a substantial failure to meet such a condition that affects multiple employees. The Department is also charged with developing a form for receiving information on these potential violations. The ACWIA specified that this provision would be effective until September 30, 2001; the October 2000 Amendments extended the effective period to September 30, 2003.

The ACWIA limits the source who may provide information under this provision to a known source who is likely to have knowledge of the employer's practices, and specifically excludes information provided to the Secretary or to the Attorney General for purposes of securing employment of a nonimmigrant. However, the Secretary is authorized to commence an investigation under this provision if the information was obtained by the Secretary in the course of an investigation under the INA or any other Act.

To allow employers to respond to the allegations before an investigation is commenced, the ACWIA provides that the Secretary shall ordinarily provide notice to the employer concerning the allegations. However, the Secretary is authorized to withhold the source's identity and is not required to provide this notice if the Secretary determines it would interfere with efforts to secure compliance with the requirements of the H–1B program.

In explaining the purpose and effect of this provision, Senator Abraham stated:

> Subsection 413(e) grants the Secretary limited additional authority with respect to other employers to investigate certain kinds of allegations of failures to comply with labor condition attestations. The Secretary's authority under current law is limited to investigating complaints concerning such violations that come from aggrieved parties. * * * The rationale for this grant of authority is to make sure that if DOL receives specific, credible information from someone outside the DOL that an employer is doing something seriously wrong but that information comes from someone who is not an aggrieved party, DOL can nevertheless pursue the lead. * * *. Thus, this provision does not authorize 'self-directed' or 'self-initiated' investigations by the Secretary.

144 Cong. Rec. S12754 (Oct. 21, 1998).

In contrast, Congressman Smith stated:

> Subsection 413(e) specifies a particular investigative process, to be used by the Secretary during the three-year period following enactment of this legislation. This process does not supplant or curtail the Secretary's existing authority in paragraph (2)(A) and does not affect the Secretary's newly-created authority under paragraph (2)(F) ('random investigations')* * *. This provision does not address the matter of ''self-directed'' or ''self-initiated'' investigations by the Secretary. * * * Congress' intent in enacting this special enforcement process was to endorse the Secretary's efforts to be more vigilant and effective in the enforcement of this Act, especially given the authorization of a substantial increase in temporary foreign workers.

144 Cong. Rec. E2327 (Nov. 12, 1998).

The Department proposed regulatory language to integrate this ''other source'' protocol with the Department's other enforcement procedures in a new § 655.806. The Department additionally noted in the NPRM that it was developing a form to be used in receiving information from ''other sources'' that would be published for public comment.

Eight comments were received regarding this provision.

Three organizations representing employees (AFL–CIO, AOTA, IEEE) supported these provisions as essential to careful monitoring of the program. IEEE stated its view that it is important that the regulations not be written or interpreted so restrictively as to effectively prevent the Department from exercising this authority. The AFL–CIO commented that the ''integrated procedures'' for handling complaints from other sources will make it easier for workers and job applicants to follow the status of the complaint and ensure that the Department examines complaints against an employer in full.

AILA commented that Congress, in providing DOL with the new other source enforcement authority, ''repudiated and eliminated the so-called 'self directed' authority to initiate investigations.''

The Department has long believed that directed (no complaint) investigations are appropriate where the Department becomes aware of a possible H–1B violation, whether in the course of an investigation of another employer, an investigation under another statute, or as the result of the receipt of information from some other source. To do otherwise would place Department staff in the untenable position of being forced to ignore knowledge of potentially serious H–1B violations secured in performance of their official duties, and would be a departure from the Department's practice under the H–1A nonimmigrant nurses program. The Department is also of the view that directed investigation authority is not precluded by the Act.

However, the Department also believes that the explicit provisions of the ACWIA concerning random investigations of willful violators and investigations based on credible information from sources other than aggrieved parties allow it to conduct ''directed'' investigations in virtually all situations in which it might have done in the past. Consequently, at least through September 30, 2003 (the date the ''other source'' investigation authority sunsets), it is the Department's intention to conduct only investigations pursuant to complaints from aggrieved parties, investigations based on information from sources other than aggrieved parties (including information obtained by the Secretary during an investigation under the INA or any other Act), and random investigations of willful violators.

AILA also requested that the Department define the terms ''substantial'' and ''pattern and practice.''

In the Department's view, it is unnecessary to define these terms in the regulations. The concept of a ''substantial'' violation, like ''willful'' violation, has been in the statute since enactment of MTINA in 1991. Furthermore, ''pattern and practice'' is a recognized concept in employment law which requires no definition. Finally, the determination of whether there is reason to believe there is a pattern or practice of failures or a substantial failure to meet a condition that affects multiple employees are determinations that are necessarily fact-specific, based upon the facts and circumstances of a particular case.

ACIP suggested that employers should be notified of receipt of complaints within 48 hours of receipt, and that a decision not to notify the employer should be a rare occurrence, happening only if the Department possesses clear evidence that the employer is likely to impede the investigation.

The Department anticipates that a decision not to notify an employer of the substance of allegations against it is likely to be a rare occurrence. It is also the Department's experience that many employers quickly remedy violations when brought to their attention. However, the Department does not believe it is appropriate to specify the time period in which notification will occur, or to delineate a standard in the regulations.

Kirkpatrick & Lockhart and Latour expressed their views that investigations should be initiated only on information from injured parties, while acknowledging that the scope of the provision goes beyond

''whistleblowers.'' The firms expressed particular concern about competitor complaints.

Contrary to the views expressed by Kirkpatrick & Lockhart and Latour, the Department is of the view that the ''other source'' provision of the ACWIA was intended to extend to any source likely to have knowledge of the employer's practices or employment conditions, or of an employer's compliance with its attestation obligations. Furthermore, the Department has long considered a competitor to be an ''aggrieved party,'' as defined in its current regulations at § 655.715.

ITAA noted that the proposed regulations correctly state that the ''other source'' provisions expire on September 30, 2001, unless continued by future legislation, and suggested that the regulations should also identify other provisions that will ''sunset'' absent further action by Congress. The point is well taken. The Department notes that Congress in the October 2000 Amendments has, in fact, extended the effective periods for this and other provisions until 2003. The Interim Final Rule identifies the provisions that will expire on particular dates, absent their extension by future legislation.

AILA requested the opportunity to review and comment on the form that is being developed to receive ''other source'' information. One commenter (BRI) asserts that Department employees should not be allowed to complete forms on behalf of a ''source,'' suggesting that the Department's involvement might have a coercive effect.

The Department has attached its proposed form to this rule in order to obtain the views of the public, as required by the Paperwork Reduction Act. The Department notes that for the convenience of the public and of the Department, it has designed one form for use both by aggrieved parties and by other sources. This will allow the Department to make a determination as to whether the source is aggrieved, and if not, whether the statutory standard is met, after review of the information submitted. The Department disagrees with the comment by BRI, noting that the ''other source'' procedure is initiated by the individual who has submitted information to the Department—not vice-versa—and that the ACWIA expressly authorizes the Department to complete the form on behalf of the individual.

The Department has made other procedural changes. Sections 655.800(b), 655.806(a), and 655.807(b) of the Interim Final Rule provide that the Administrator may interview the complainant or other person supplying information to determine whether the statutory standards are met. (As a courtesy, the Administrator will notify the person providing the information if the standards have not been met, or if, after the determination by the Secretary, an investigation will be conducted.)

The section has been restructured, in accordance with the Department's reading of the statute, to provide that the employer will ordinarily be provided information regarding the allegations and given an opportunity to respond after the Administrator has made an initial determination that the statutory standards are met, rather than prior to this determination. The Administrator will then review this information in order to determine if the allegations should be referred to the Secretary for a determination as to whether an investigation should be commenced. Where the Administrator has determined that notification to the employer should be dispensed with, the Secretary will be advised in the referral; there will be no review of this determination other than by the Secretary.

Section 655.806(a)(3) (and the corresponding provision in § 655.807(i)) is clarified based on the Department's enforcement experience to provide that the time to conduct an investigation may be increased where, for reasons outside of the control of the Administrator, additional time is necessary to obtain information from the employer or other sources to determine if a violation has occurred. It has been the Department's experience that employers do not always timely provide requested information; in other circumstances Wage-Hour must obtain documentation from other agencies, such as information from INS regarding petitions filed (especially where employers have not provided requested information or where needed to verify information supplied by employers).

4. What Protections Are Provided to Whistleblowers by the ACWIA? (§ 655.801)

Section 212(n)(2)(C)(iv) of the INA as amended by the ACWIA provides explicit protection for H–1B employees who exercise their H–1B rights by complaining about a violation of the Act or cooperating with an investigation. An employer may not ''intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner discriminate against [such] employee.'' ''Employee'' is defined to include former employees and applicants for employment. Like other whistleblower statutes, the ACWIA provision protects an employee's ''internal'' complaint to the employer or to any other person, as well as an employee who cooperates in an investigation or proceeding concerning an employer's compliance with the Act and these regulations. As Senator Abraham stated, this provision ''essentially codifies current Department of Labor regulations concerning whistleblowers.'' 144 Cong. Rec. S12752 (Oct. 21, 1998).

Section 212(n)(2)(C)(vi) directs the Department and the Attorney General to establish a process to enable an H–1B worker who files a whistleblower complaint to remain in the United States and seek other appropriate employment for a period not to exceed the maximum period provided for the H–1B classification. As noted in the NPRM, the Department and the INS are working in close cooperation to develop this process. This mechanism, however, is not within the scope of this rulemaking.

The whistleblower enforcement provision elicited five comments.

APTA, AOTA, and IEEE expressed strong support for the statute's whistleblower provisions.

AILA suggested that the ACWIA's anti-retaliation language protecting an employee from retaliation where the employee has disclosed information that the employee ''reasonably believes evidences a violation'' of the H–1B provisions covers only ''genuine infractions of law.'' It therefore suggested that the Department should amend its rule to make clear that the disclosure ''must be other than a de minimis violation.''

The Department rejects this interpretation. The Department is of the view that Congress intended that the Department, in interpreting and applying this provision, should be guided by the well-developed principles that have arisen under the various whistleblower protection statutes that have been administered by this Department (see 29 CFR part 24). The Department also believes that, as in those programs, the parameters of the provision are best developed through adjudication rather than through rulemaking. The Department points out that the statutory test is whether the employer has discriminated against an employee because the employee disclosed information the employee reasonably believed evidenced a violation, or because the employee cooperated or sought to cooperate in an investigation or other proceeding. The Department believes that there is no basis for inferring an intention to protect only complaints of actual infractions of

law, or to exclude potential *de minimis* violations.

BRI commented that the employer should not be liable for wrongful termination until found guilty by the appropriate authority. The Department agrees that an employer is not liable for wrongful termination until a final decision is issued in a Department of Labor proceeding.

5. What Changes Does the ACWIA Make in Enforcement Remedies and Penalties? (§ 655.810)

Prior to the ACWIA's enactment, the INA authorized the assessment of a civil money penalty (up to $1,000 per violation) and debarment from the sponsorship of nonimmigrant aliens for employment (at least one year), among other unspecified remedies, for H–1B violations. In place of this ''unitary'' scheme, section 212(n)(2)(C)(i)–(iii) of the INA as amended by the ACWIA established a three-tier scheme for sanctions and remedies, depending upon the nature and severity of the violations. The first tier provides for up to $1,000 per violation and debarment for at least one year (for violations of the attestation provisions regarding a strike or lockout, or the dependent employer/willful violator provisions regarding displacement; or for substantial violation of the attestation provisions regarding notice, the details of the attestation, or the dependent employer/willful violator provisions regarding recruitment). The second tier provides for up to $5,000 per violation and debarment for at least two years (for willful violations of any of the attestation provisions, willful misrepresentation, or violation of the whistleblower provisions). The third tier provides for up to $35,000 and debarment for at least three years (for willful violations of any of the attestation provisions or willful misrepresentation, in the course of which violation or misrepresentation the employer displaced a U.S. worker within the period beginning 90 days before and ending 90 days after the filing of an H–1B petition supported by the LCA). In each of the three penalty tiers, as in the previous statutory provision, the ACWIA authorizes the imposition of ''such other administrative remedies as the Secretary determines to be appropriate.''

In explaining new clause (iii), Senator Abraham explained:

> The rationale for this new penalty is that there have been expressions of concern that employers are bringing in H–1B workers to replace more expensive U.S. workers whom they are laying off. Current law, however, requires employers to pay the higher of the prevailing or the actual wage to an H–1B worker. Thus, the only way an employer could profitably be systematically doing what has been suggested is by willfully violating this obligation. Otherwise, the employer would have no economic reason for preferring an H–1B worker to a U.S. worker as a potential replacement. Thus, the new penalty set out in new clause (iii) is designed to assure that there are adequate sanctions for (and hence adequate deterrence against) [willful violations of the wage provisions] by imposing a severe penalty on a willful violation of the existing wage-payment requirements in the course of which an employer 'displaces' a U.S. worker with an H–1B worker.
>
> At the same time, Congress chose not to make the layoff itself a violation. The reason for this is that there are many reasons completely unconnected to the hiring of H–1B workers why an employer may decide to lay off U.S. workers. * * * Accordingly, it is important to understand that unlike the new attestation requirements imposed by the amendments to section 212(n)(1), clause (iii) of section 212(n)(2)(C) provides no new independent basis for DOL to investigate an employer's layoff decisions. The only point at which DOL can do so pursuant to clause (iii) is after it has already found that the employer has committed a willful violation of one of the pre-existing labor condition attestations.
>
> * * * At that point, and not before, provided that there is reasonable cause to believe that an employer had also displaced a U.S. worker in the course of committing that violation, it would be proper for DOL to investigate, but only in order to ascertain what penalty should be imposed. The definitions concerning ''displacement'' and the like, set out in new 212(n)(3) and 212(n)(4) of the Immigration and Nationality Act, and discussed in the previous portion of this section-by-section analysis dealing with the amendments to that Act made by section 412 of this legislation, apply in this context as well.

144 Cong. Rec. S12752 (Oct. 21, 1998).

Congressman Smith explained that new clause (iii) ''clarifies that certain kinds of employer conduct constitute a violation of the prevailing wage attestation, and that other kinds of employer conduct are also prohibited in the H–1B program. * * * Congress intends that this new penalty will assure that there are adequate sanctions for (and hence adequate deterrence against) any willful violation of the existing wage-payment requirements in the course of which an employer 'displaces' an American worker with an H–1B worker.'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

These penalty provisions do not apply to the ACWIA prohibitions on penalizing an H–1B worker for his or her early cessation of employment, or on requiring an H–1B worker to reimburse the filing fee. For these violations, the Department, instead, may impose a civil money penalty of $1,000 for each violation and reimbursement of the H–1B worker (or the Treasury if the worker cannot be located). Debarment is not available as a sanction for these violations.

In the NPRM, the Department proposed that ''appropriate administrative remedies'' would include the imposition of curative actions such as providing notice to workers and affording ''make-whole'' relief for displaced workers, whistleblowers, or H–1B workers who failed to receive proper benefits or eligibility for benefits.

Senator Abraham and Congressman Smith had divergent views regarding the Secretary's authority to impose such remedies. Senator Abraham stated that these remedies ''do not include an order to an employer to hire, reinstate, or give back pay to a U.S. worker as a result of any violation an employer may commit.'' 144 Cong. Rec. S12752 (Oct. 21, 1998). Congressman Smith, on the other hand, stated that ''Congress intends that such remedies will include 'make-whole' relief for affected American workers (such as, in appropriate circumstances, monetary compensation to the American worker or reinstatement to the job from which the American worker was dismissed or placement in the job to which the American worker should have been hired).'' 144 Cong. Rec. E2325 (Nov. 12, 1998).

Several commenters (Senators Abraham and Graham, AILA, Network Appliance, Rubin & Dornbaum, Satyam, and White Consolidated Industries) stated that the authority to seek make-whole relief has never been asserted by the Department and is beyond the authority granted to the Department by the ACWIA. Other Congressional commenters commented that the proposed regulations on the scope of administrative remedies go far beyond what the statute contemplates, without specifically referring to make-whole relief.

After careful consideration, the Secretary remains persuaded that the plain language of the ACWIA (''the Secretary * * * may * * * impose such other administrative remedies * * * as the Secretary determines to be appropriate'') provides the Secretary the authority to award whatever relief is appropriate in the circumstances of a case, including make-whole relief. Since the Act already contains explicit authority for civil money penalties, back wages, and debarment, it seems apparent that Congress intended to allow the Secretary to order other appropriate remedies to cure the violations. In the case of displacement

or whistleblower violations in particular, such relief must logically include reinstatement and back pay. Nor does the Department believe that the fact that explicit language concerning such relief was not contained in the ACWIA, as Senator Abraham indicates was sought by the Administration, equates to an express legislative denial of such remedial authority to the Secretary.

ITAA, ACIP, and Intel requested that the Department define the various terms used in the statute's three-tier scheme for violations.

The Department notes that ''willful failure'' is currently defined in the regulations at § 655.805(b). As discussed above, it is the Department's view that it is unnecessary to define these terms further in the regulations.

SBSC sought assurances that ''punitive approaches'' would not be applied where there is an absence of negligence, fraud, or other blameworthy action. Intel and ACIP suggest that the Department should recognize, in effect, a good faith defense for an employer that is found in violation of the statute. Intel suggests that the Department should establish a practice akin to that provided for I–9 violations by 8 U.S.C. 1324a(b)(6). This provision stipulates that under certain circumstances ''a person is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with this requirement.''

In the Department's view, the ACWIA does not provide a general defense in the nature of those suggested by SBSC and Intel. Entirely missing from the statute is any provision comparable to 8 U.S.C. 1324a(b)(6). At the same time, however, it should be noted that the Department is vested with some enforcement discretion and intends to exercise this discretion in accordance with the purposes served by the statute and the public interest. Where appropriate, the Department will consider the totality of the circumstances, including an employer's demonstrated good faith attempts at compliance, in fashioning remedies appropriate to the violation. In this regard, the Department notes that its regulations providing the factors to be considered in assessing the amount of civil money penalties include an employer's good faith efforts to comply, the gravity of the violations, and the violator's explanation of the violations. See § 655.810(c) of the current regulations.

Several individuals urged the imposition of heavy penalties upon violators. The AFL–CIO suggested in particular that the Department should make greater use of the debarment penalty in cases that are resolved through consent judgments or other means of settlement.

The Department, of course, will be guided by the penalty scheme established by Congress and the Department's regulatory provisions governing debarment and the assessment of penalties. The ACWIA establishes a three-tier system for debarment and civil money penalties; the remedy in a particular case will depend upon the category of the violation involved and consideration of the regulatory factors, which may enhance or reduce a civil money penalty under the particular circumstances of the violation. The Department notes that the ACWIA particularly recognizes the gravity of willful violations, as demonstrated by the longer debarment period and authority to conduct random investigations. Accordingly, the Secretary will insist on debarment in appropriate cases.

The individual commenters urged the Department to issue a regulation that informs American workers of their rights under the statute. ITAA also suggested that the regulations should address the Attorney General's role under the statute.

The Interim Final Rule lays out the obligations of H–1B-dependent employers and willful violators, including the requirements—as laid out in Sections D and E of the NPRM—that they not displace workers, that they not place H–1B workers at worksites of other employers where U.S. workers are being displaced, that they recruit U.S. workers using industry-wide procedures, and that they offer the job to any U.S. worker who applies who is equally or more qualified than the H–1B workers. The rule also explains the provision for filing complaints with the Attorney General for violations of the hiring requirement. In addition, although there is no direct remedy for U.S. workers who are not employed by dependent employers or willful violators, they may file complaints with the Department.

ITAA requested that the Department clarify enforcement regulations as they pertain to recruitment violations and specify that only H–1B-dependent employers may be liable for such violations. The Interim Final Rule has been clarified to make clear that only an H–1B-dependent employer or willful violator may be held liable for a recruitment violation. The recruitment obligations of dependent employers are discussed in much greater detail in IV.E, above.

Finally, on review of the NPRM, the Department notes that it had misconstrued the scope of the third tier of penalties. The highest level of penalties (up to $35,000 per violation and a minimum of three years of debarment) are applicable whenever any employer displaces a U.S. worker in the course of committing a willful violation of any of the attestation provisions or a willful misrepresentation—regardless of whether the employer is a dependent employer or willful violator subject to the new attestation provisions of the ACWIA. In the Department's view this construction is clear from a careful reading of the statutory language, as well as the statement describing this provision by Senator Abraham, quoted above, at 144 Cong. Rec. S12752 (Oct. 21, 1998). Application of this higher penalty will arise only where the Department determines that the employer has committed a willful violation of an attestation requirement—*e.g.,* the employer has willfully failed to pay the required wage to H–1B workers. If the Department determines that the employer has displaced a U.S. worker within the period between 90 days before and 90 days after the LCA was filed, and that the employer has replaced that worker with an H–1B worker whom the employer has willfully failed to pay the required wage, the employer will be subject to a CMP of up to $35,000 per violation of the attestation requirements; in addition, the Department will advise INS, which shall not approve any petitions for at least a three-year period. The Interim Final Rule has been amended to correct this provision.

In addition, the H–1B enforcement provisions contained in Subpart I of Part 655 have been restructured to make them clearer and more user-friendly. Changes have also been made to comport with the Department's enforcement experience. Specifically, as discussed in IV.M.3, above, § 655.806(a)(3) (and the corresponding provision in § 655.807(i)) clarifies that the time to conduct an investigation may be increased where, for reasons outside of the control of the Administrator, additional time is necessary to obtain information from the employer or other sources to determine if a violation has occurred. Sections 655.800(b), 655.806(a), and 655.807(b) provide that the Administrator may interview the complainant or other person supplying information to determine whether the statutory standards are met.

Various clarifying changes have been made to proposed § 655.810, setting forth the remedies available to the Administrator upon a finding of violations. As discussed in IV.G, above, the Department has determined that certain benefits are in the nature of compensation for services rendered, and have a monetary value to workers and monetary cost to employers. Therefore such benefits are more in the nature of wages than of working conditions. Paragraph (a) of § 655.810 makes it clear that payment of unpaid benefits can be ordered by the Administrator pursuant to the Administrator's authority to order payment of back wages under section 212(n)(2)(D).

In addition, the Interim Final Rule clarifies at §§ 655.810(a)(14) and 655.810(a)(16) that the Department will issue CMP assessments for violations of the public access provisions of the Act, or for regulatory violations, such as a failure to cooperate in the investigation (see § 655.800(c)). The Department will also assess CMPs for violations of the recordkeeping requirements, where the violation impedes either the ability of the Administrator to determine whether a violation of the H–1B requirements has occurred, or the ability of members of the public to have information needed to file a complaint or information regarding alleged violations of the Act. Under the existing regulations (§ 655.810(b)), CMP assessments may be imposed for any violations of the regulations.

Finally, in conformance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (see 28 U.S.C. 2461 note), new § 655.810(f) provides for inflationary adjustments to be made, by regulation, to civil money penalties in accordance with a specified cost-of-living formula. Such adjustments will be published in the Federal Register. The amount of the penalty in a particular case will be based on the penalty in effect at the time of the violation.

N. What Modification to Part 656 Does the ACWIA Provide for the Determination of the Prevailing Wage for Employees of ''Institutions of Higher Education,'' ''Related or Affiliated Nonprofit Entities,'' ''Nonprofit Research Organizations,'' or ''Governmental Research Organizations''? (§ 655.731(a)(2), § 656.40)

The ACWIA amends the INA (Section 212(p)(1), 8 U.S.C. 1182(p)(1)) to require that the computation of the prevailing wage for employees of institutions of higher education, nonprofit entities related to or affiliated with such institutions, nonprofit research organizations, and Governmental research organizations only take into account the wages paid by such institutions and organizations in the area of employment. In addition, section 212(p)(1) provides that with respect to professional athletes as defined in section 212(a)(5)(A)(iii)(II), where the job opportunity is covered by professional sports league rules, the wage prescribed by those rules shall be considered the prevailing wage. This ACWIA directive concerning academic and research institutions affects both the H–1B program and the Permanent Labor Certification program, since both programs use the prevailing wage computation procedures set out in the Permanent program regulation at 20 CFR 656.40. The provision regarding professional athletes affects only the Permanent program.

On March 20, 1998 (63 FR 13756), the Department published a Final Rule amending its Permanent Labor Certification regulation to change the effects of the *en banc* decision of the Board of Alien Labor Certification Appeals in *Hathaway Children's Services* (91–INA–388, February 4, 1994), which required prevailing wages to be calculated by using wage data obtained by surveying across industries in the occupation in the area of intended employment. The 1998 Final Rule, in effect, allows prevailing wage determinations made for researchers employed by colleges and universities, Federally Funded Research and Development Centers (FFRDCs) operated by colleges and universities, and certain Federal research agencies to be made by using wage data collected only from those entities. The Department stated in the Preamble to that Final Rule that the amendment to the regulation also changed the way prevailing wages are determined for those entities filing H–1B labor condition applications on behalf of researchers, since the regulations governing the prevailing wage determinations for the Permanent program are followed by State Employment Security Agencies (SESAs) in determining prevailing wages for the H–1B program as well.

The ACWIA provision goes considerably beyond the regulatory amendments made by the Department. The ACWIA provisions extend to all nonprofit research organizations and Governmental research organizations. In addition, the ACWIA provisions extend not only to researchers, but to all occupations in which institutions of higher education, nonprofit entities related to or affiliated with such institutions, and nonprofit research organizations or Governmental research organizations may want to employ H–1B workers or aliens immigrating for the purpose of employment.

In describing the application of this provision, Senator Abraham stated in pertinent part:

> Paragraph 212(p)(1) provides that the prevailing wage level at institutions of higher education and nonprofit research institutes shall take into account only employees at such institutions. The provision separates the prevailing wage calculations between academic and research institutions and other non-profit entities and those for for-profit businesses. Higher education institutions and nonprofit research institutes conduct scientific research projects, for the benefit of the public and frequently with federal funds, and recruit highly-trained researchers with strong academic qualifications to carry out their important missions. The bill establishes in statute that wages for employees at colleges, universities, nonprofit research institutes must be calculated separately from industry.

144 Cong. Rec. S12756 (Oct. 21, 1998).

The Department consulted with the INS on the definitional issues, since that agency has addressed similar issues with regard to the implementation of the additional fee required for petitions on behalf of H–1B nonimmigrants. The employers excluded from that fee are the same as the employers specified in the ACWIA provision concerning prevailing wage determinations. The Department worked with the INS in developing the following definitions contained in its Interim Final Rule published on November 30, 1998 (63 FR 65657), 8 CFR 214.2(h)(19)(iii)(B):

> ''*An institution of higher education,* as defined in section 801(a) of the Higher Education Act of 1965;
>
> ''*An affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary;
>
> ''*A nonprofit research organization or Governmental research organization.* A research organization that is either a nonprofit organization or entity that is primarily engaged in basic research and/or applied research, or a U.S. Government entity whose primary mission is the performance or promotion of basic and/or applied research. Basic research is research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial

interest. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services.''

The INS Interim Final Rule also provides, in relevant part, that a nonprofit organization or entity is one that is qualified as a tax exempt organization under Section 501(c) (3), (4) or (6) of the Internal Revenue Code of 1986 (IRC) and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

In the NPRM, the Department sought comments on the proper definitions of the entities to which the ACWIA prevailing wage provisions apply. The Department shared these comments with INS in the development of definitions to apply to both the INS and Departmental regulations. Comments received by INS concerning these definitions have also been considered by the Department and are included in the record of this rule.

In order to determine prevailing wages as required by the ACWIA, the Department explained that it is also necessary to determine the appropriate universe(s) to survey, and to determine the availability of relevant, reliable data. The Act sets forth the four types of organizations in two groups: educational institutions and related research organizations; and other nonprofit research organizations and Governmental research organizations. The Department stated, however, that the Act does not seem to require that prevailing wages be determined separately for those two groups, as distinguished from a universe consisting of all four groups, or surveys of the four types of organizations separately, or some other combination.

The Department explained in the NPRM that it has reason to believe that it may not be feasible to identify the different kinds of entities that might comprise educational institutions' related or affiliated nonprofit entities, or nonprofit research organizations. If those entities cannot be identified, it may not be possible to properly define the universe that should be surveyed to determine the appropriate prevailing wages. One possible alternative the Department said it would explore is the use of the prevailing wage data it currently collects in surveying institutions of higher education to determine prevailing wages for one universe consisting of institutions of higher education, affiliated or nonprofit research institutions, and nonprofit research organizations. The Department also stated that data currently being collected by the Office of Personnel Management (OPM) may be able to be used to determine prevailing wages for Federal Governmental research organizations.

The Department sought comments on the appropriate universes to use in determining prevailing wages for the entities (employers) mentioned in the ACWIA, methods to develop an appropriate universe, and the feasibility and appropriateness of the Department's using data collected from institutions of higher education and Federal Governmental research organizations to determine prevailing wages.

In the period since the NPRM was published, INS has published its Final Rule implementing the fee provisions of the ACWIA (65 FR 10678; February 29, 2000). These regulations include provisions defining organizations which are exempt from the H–1B petition filing fee. As discussed above, the ACWIA defines exempt organizations as those organizations described in section 212(p)(1). More recently, the October 2000 Amendments (Pub. L. 106–311) amended section 214(c)(9) of the INA to provide a modified definition of organizations exempt from the fee. However, this recent provision has no effect on the Department's prevailing wage obligation.

The Department received six comments on this section of the NPRM. The American Council on Education (ACE) also attached a copy of its comments on the INS Interim Final Rule. The Department also reviewed the comments received by INS pertaining to this issue.

With respect to definitions of covered entities, ACE and the Association of Independent Research Institutes (AIRI) commended the efforts of federal agencies to jointly develop regulatory definitions, and urged that all regulations that implement ACWIA sections include identical definitions, regardless of the agency source of the regulation.

AIRI stated that the proposed definitions adequately cover its member institutions—independent, nonprofit research institutions performing basic and clinical research in behavioral sciences. Similarly, the Smithsonian Institution stated that it had no problem with the definitions, stating that it believes that it qualifies as both a nonprofit research organization and as a governmental research organization.

ACE observed that the new section 212(p)(1) references only those institutions included in section 101(a) of the Higher Education Act of 1965. (ACE pointed out a typographical error in the NPRM, which referenced section 801 of the Higher Education Act rather than section 101(a).) The Higher Education Amendments of 1998 (Pub. L. No. 105–244, 112 Stat. 1581 (Oct. 7, 1998)), reauthorized the Higher Education Act and made a number of amendments. Institutions contained in sections 101(a) and (b) of the Act as amended in 1998, 20 U.S.C. 1001(a) and (b), were formerly contained in 20 U.S.C. 1201(a), which itself incorporated 20 U.S.C. 1088. ACE stated its belief that Congress inadvertently neglected to reference section 101(b) as well as section 101(a) of the Higher Education Act as amended in 1998 when it passed the ACWIA. ACE requested that the definition of an ''institution of higher education'' contained in the NPRM therefore be modified to include both section 101(a) and section 101(b), pending clarification by the Department of Education or a technical amendment. Unless this is done, ACE contends, some categories of higher education, such as independent medical colleges or graduate universities, might not qualify for the academic prevailing wage determination.

ACE further stated, with respect to definitions, that the NPRM did not define a ''governmental research organization.'' Both AILA and ACE stated that the definition should indicate that such organizations include all federal, state, and local government laboratories conducting scientific and/or scholarly research. ACE also noted that FFRDCs are operated by contractors rather than the Federal Government itself. ACE suggested that FFRDC contractors should be eligible for the academic prevailing wage if they are institutions of higher education, affiliated or related nonprofit entities, nonprofit research organizations, or governmental research organizations. ACE also recognized the problem inherent in applying the prevailing wage methodology provided for by section 212(p)(1) to for-profit contractors that operate FFRDCs. Nonetheless, ACE indicated it considered all FFRDC's to be members of the academic research community, and expressed hope that the Department will work with the ACE and the FFRDC contractor community to develop an appropriate solution to allow all academic researchers to be treated equally.

ACE also urged that the definition of ''affiliated or related nonprofit entity'' include, in addition, those nonprofit research hospitals which have an

historic affiliation with universities but do not meet the strict definition of ''affiliation'' in the INS Interim Final Rule. ACE proposed a specific modification of the definition to accommodate these hospitals. Similarly, AILA maintained in the comments it submitted to INS, that ''[c]ertain non-profit or governmental (non-research) institutions may have arrangements for the sharing of information, training or research with educational institutions, yet would not by this definition [of affiliated or related non-profit entity] be exempt from the fee.''

Finally, ACE urged that the definition of nonprofit organizations or entities be modified so that a state or local organization exempt from tax under IRC Section 115 or under an applicable state law qualifies as a nonprofit organization or entity for purposes of the ACWIA. By doing so, ACE contends, the Department's regulation would be consistent with the INS Interim Final Rule.

The Research Corporation of the University of Hawaii (RCUH) sought clarification regarding its status. RCUH explained that it was established by the State of Hawaii as a ''public instrumentality,'' part of the University of Hawaii ''for administrative purposes only,'' and non-profit under state law but not under the IRC. It expressed the view that both DOL and INS had failed to consider the special category of public/private semi-autonomous, non-profit research organizations created by other government agencies, and that they fit within the intent of the ACWIA language regarding non-profit research organizations.

In its comments on the definition provisions of the NPRM pertaining to nonprofit research organizations and Governmental research organizations, AILA maintained that the use of the word ''scientific'' connotes a natural science like chemistry or physics, but not a social science like history or sociology. In addition, AILA opined that the distinction between basic research and applied research is often a distinction drawn within the natural sciences, and that the NPRM therefore implies that DOL believes that ACWIA amendments covers only nonprofit organizations engaged in natural science research. The ACWIA amendments, according to the AILA, broadly refer to research and nowhere introduce the language limiting the amendment to natural science research.

With respect to the definition of ''nonprofit research organization,'' AILA opined that nonprofit research organizations engaged in substantial research should be covered by the ACWIA amendments, whether or not research is the nonprofit's primary purpose. AILA suggested that the Department's definition of nonprofit research organizations include ''organizations primarily engaged in research and organizations engaged in research as an essential or significant element of their operations.''

A law firm representing Texas school districts and private schools (Tindall and Foster) commented that elementary and secondary educational institutions should be exempt from the filing fee because they operate on tighter budgets than institutions of higher education and because of the critical shortage of bilingual teachers. That commenter also stated that ACWIA prevailing wage provisions should include elementary and secondary education institutions.

With regard to the comments by ACE that the definition of ''(a)n institution of higher education'' presented in the NPRM should be modified to include those institutions contained in section 101(b), as well as those contained in section 101(a) of the Higher Education Act, as amended by the Higher Education Amendments of 1998, the Department believes it is constrained by the unambiguous statutory language to include only those institutions in section 101(a). Furthermore, there is no indication in the legislative history as viewed in conjunction with the history of the Higher Education Amendments to indicate Congress intended to include section 101(b).

Concerning the view expressed by ACE and AILA that the definition of a ''Governmental research organization'' should include state and local government laboratories conducting scientific and/or scholarly research, the Department has concluded that by Congress' use of the initial capital ''G'' in the word ''Governmental'' in the statute, Congress intended to limit the provision to the Federal research organizations. In the INA, the words ''Government'' and ''government'' appear numerous times. It appears that only when a small ''g'' is used, does the term include state and local as well as Federal government agencies. See the discussion in C. Stine, ''Out of the Shadows: Defining 'Known to the Government' in the Immigration Reform and Control Act of 1986,'' 11 Fordham Int'l L.J. 641, 653 (Spring 1988); see also *Kalaw* v. *Ferro,* 651 F. Supp. 1163 1169–70 (W.D.N.Y. 1987). Furthermore, throughout the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105–277, 112 Stat. 2681 (Oct. 21, 1998), of which the ACWIA is a part, it appears that a capital ''G'' is used to mean the United States government or the government of a foreign nation, while a small ''g'' is used to refer to state, local, and tribal governments (unless the complete term ''Federal government'' is used). See also, *State Bank of Albany* v. *United States,* 530 F.2d 1379, 1382 (Ct. CL. 1976).

The Department agrees with the view expressed by ACE that the status of entities contracting with FFRDCs determines the application of the special provisions of Section 212(p)(1). An academic institution operating an FFRDC, for example, would obtain the prevailing wage determination applicable to academic institutions. The determination of prevailing wages for for-profit employers that operate FFRDCs is outside the scope of the proposed rule and is not addressed in this document.

As noted above, ACE recommended that the definition of ''[a]n affiliated or nonprofit entity'' be modified to include other ''nonprofit research hospitals'' that do not meet the definition of ''affiliation'' in the Department's NPRM and the INS Interim Final Rule and, because their primary mission is patient care, do not meet the definition of a ''nonprofit research organization.'' Specifically, ACE recommended that the phrase ''or through a documented understanding or affiliation'' be added to the definition. The Department is of the view, however, that the definition of ''affiliated or related nonprofit entity'' in the NPRM and the INA Interim Final Rule is consistent with the ordinary meaning of the phrase. The definition proposed by ACE is inappropriately broad and would likely include many entities in addition to the ones about which ACE and AILA are concerned. Consequently, the Department has decided not to adopt the modification to the definition of ''affiliated or nonprofit entity.''

In support of its view that the definition of a nonprofit organization or entity should be modified to include organizations exempt from tax under section 115 of the IRC (26 U.S.C. 115) or under an applicable state law as a nonprofit organization or entity, ACE stated that INS covers such organizations in its interim rule. To the contrary, the INS Interim Final Rule at 8 CFR 214.2(h)(iv) does not provide that organizations can qualify as nonprofit entities on the basis of being exempt from tax under IRC Section 115 or under an applicable state law, but instead provides at § 214.2(h)(iv):

> For purposes of paragraphs (h)(19)(B) and (C) of this section, a nonprofit organization or entity is one that is qualified as a tax exempt organization under section 501(c)(3),

(4) or (6) of the Internal Revenue Code of 1966 (26 U.S.C. 501(c)(3), (c)(4) or (c)(6)) and has received approval as a tax exempt organization from the Internal Revenue Service, as it relates to research or educational purposes.

The preamble to the INS Interim Final Rule (63 FR 65658) does acknowledge that certain organizations (*e.g.,* churches) qualify for nonprofit status without a notice from the IRS confirming such status. (It is unlikely that such organizations would be institutions of higher education and related or affiliated institutions, or nonprofit and Governmental research organizations.) The INS goes on to state that it believes that most employers of specialty occupation workers claiming an exemption will be able to meet the evidentiary requirement specified in the rule, either with a notice from the IRS or other documents demonstrating the United States employer's nonprofit status. The Department agrees with these statements by INS. The preamble to the INS rule does not indicate that nonprofit status will in any instance be determined by the employer's tax exempt status pursuant to IRC Section 115 or state law. Moreover, we see no reason to include entities encompassed by Section 115 within the definition of nonprofit entities. Section 115 does not purport to be a list of tax-exempt organizations, but rather is a reference to the kinds of state income which are excluded from gross income in determining income tax. Furthermore, the Department believes that it is generally accepted that nonprofit status is determined by an entity's status under section 501(c). If Congress wanted an entity's nonprofit status to be determined by state law, Congress could have expressly so provided.

Based on the foregoing, this rule provides, as does INS' Interim Final Rule, that a nonprofit organization or entity is one that is qualified as a tax exempt organization under IRC section 501(c)(3), (c)(4) or (c)(6), and has received approval from the Internal Revenue Service as it relates to research or educational purposes.

As indicated above, AILA believed the Department was implying in the NPRM that the ACWIA amendments and the definitions in the NPRM pertaining to nonprofit research organizations and Governmental research organizations only applied to organizations engaged in natural science research. The definitions of basic research and applied research used in the NPRM (and the INS interim rule) are based on the definitions of ''Basic Research'' and ''Applied Research'' found on pages 4–9 of Science & Engineering Indicators—1996, published by the National Science Foundation (NSF). The materials contained in the NSF publication indicate that these definitions apply to the social and behavioral sciences (which include psychology, sociology and other social sciences), as well as the natural sciences (which include all physical, earth, atmospheric, biological and agricultural sciences). NSF staff have confirmed that the NSF definitions of basic and applied research apply to both the social and natural sciences. These definitions are used in NSF's resource surveys and are well understood by members of the research community. The Department has revised the regulation to provide that ''research'' includes research in the sciences, social sciences, and humanities.

The Department has also concluded that the definition of nonprofit research organization should be limited to organizations primarily engaged in research. We believe this is most consistent with the statutory phrase ''research organization.'' Furthermore, Senator Abraham's statement, quoted above, indicates a specific Congressional intent that the determination of the prevailing wage not include other types of nonprofit entities. In addition, since workers in all occupations for which nonprofit research entities file H–1B labor condition applications or applications for alien employment certification are potentially affected by the ACWIA prevailing wage amendments, the proposed modification could affect large numbers of H–1B workers not engaged in research or related activities, thereby increasing the possibility of an adverse effect on U.S. workers who are not engaged in research or related activities. The Department believes such a construction would not be consistent with Congressional intent.

As indicated above, AILA indicated in its comments that the groups included in prevailing wage determinations should only include ''similarly employed'' individuals. This issue is outside the scope of this rulemaking. However, it is the Department's position that all occupations included within an OES occupational group for which prevailing wage determinations are provided are ''similarly employed.'' The Department also notes that the OES does collect data for faculty members by certain disciplines in accordance with an agreement reached with the academic community.

With regard to the collection of prevailing wage data and prevailing wage determinations, ACE and AIRI strongly supported the Department's approach as the most feasible solution to meeting the ACWIA requirements. These two organizations observed that institutions of higher education, affiliated and related research institutions, and nonprofit research organizations, are comparable for prevailing wage purposes due to the similarity of their missions and employment of H–1B nonimmigrants. ACE recommended a separate category for governmental research organizations based on their understanding that pay scales and wages for government research labs and other related activities are established and predetermined by federal, state and local governments, and do not necessarily correspond to the other three groups. The Smithsonian Institution opposed this approach, and urged the Department to treat all groups as a single universe for purposes of determining prevailing wage levels. The Smithsonian also noted that the NPRM did not address the issue of how organizations in the four groups are to make their status known to the local SESA for prevailing wage determinations. Moreover, the Smithsonian recommended that the Department follow the example of the INS for I–129W, with no additional evidentiary requirements.

ACE also expressed concern regarding the Department's treatment of independent academic wage surveys, stating its view that much DOL and state and local government academic wage information is inaccurate due to inclusion of an insufficient number of academic institutions. It therefore encouraged the Department to adopt independent surveys of academic wages.

AILA argued that the division of employer groups into two distinct subparagraphs in section 212(p)(1) is indicative of Congressional intent to treat the two groups separately. AILA further commented that the groups included in the prevailing wage determination should only include similarly employed individuals, as distinguished from a group of occupations. AILA also stated that similarly employed workers should include reference to the skills and knowledge required by the position.

As noted in the NPRM, the Department does not believe that the ACWIA requires that the four types of organizations be grouped in any particular way in determining the universe for prevailing wage surveys. The Department agrees with AIRI and ACE that there are substantial similarities among employment found in colleges and universities, affiliated or

related nonprofit entities, and nonprofit research organizations. Therefore, the Department plans to use the data it currently collects in surveying institutions of higher education to determine prevailing wages for institutions of higher education, related or nonprofit entities, and nonprofit research organizations.

The Department also agrees with ACE that pay scales for Governmental research laboratories and other related activities are established by the Federal government and do not necessarily correspond with the three other groups mentioned above. For this reason, the Department does not contemplate including Governmental research organizations in the same universe as the other three types of organizations unless the technical problems in determining prevailing wages for the Government research organizations prove to be insurmountable. The Department intends to use data currently being collected by the Office of Personnel Management relating to Federal Government employment to determine prevailing wages for Federal Government research organizations if certain technical issues can be satisfactorily resolved. One possible alternative approach would be to use Government-wide prevailing wage data by occupation as a proxy for prevailing wages in Government research organizations.

As an interim measure, since the prevailing wage provisions were effective on enactment of the ACWIA, the Department has issued a directive that provides that prevailing wages for institutions of higher education, affiliated or nonprofit entities, nonprofit research organizations and Government organizations should be based on the wages now being collected by the Occupational Employment Statistics Program for colleges and universities. General Administrative Letter No. 2–99, (GAL 2–99) dated April 23, 1999, ''Subject: Availability and Use of Occupational Employment Statistics Survey Data for Alien Labor Certification Purposes.'' With regard to ACE's comments on use of independent academic wage surveys, the Department points out that its guidance in GAL 2–98, dated October 31, 1997, ''Subject: Prevailing Wage Policy for Nonagricultural Immigration Programs,'' allows employers to submit their own surveys, which will be used by the SESA to determine prevailing wage if they meet the required standards.

With respect to the suggestion from the law firm that elementary and secondary educational institutions should be made exempt from the filing fee and should be included within the scope of the prevailing wage provisions, the Department notes that the fee provision has been modified by the October 2000 Amendments to exempt such organizations, but no such modification was made to the prevailing wage provisions.

The Smithsonian Institution in its comments points out that one issue not addressed in the NPRM is how the categories of employers are to make their status known when they ask the local SESA for a prevailing wage determination. These provisions have been in effect since enactment of the ACWIA and the Department has not found that any additional paperwork requirements are necessary. The Department anticipates that employers which are entitled to this provision will make themselves known. If additional guidance is necessary, the Department will provide it.

The regulatory text consistent with the above discussion is incorporated in the rules for the Permanent program, 20 CFR part 656, § 656.40(c). Conforming changes are made to cross-reference this provision in § 656.40(a) and in the H–1B regulations at § 655.731(a)(2) and (3). In addition, the related provisions concerning prevailing wages for academic institutions and certain Federal research agencies at § 656.3 (definition of ''Federal research agency'') and Subpart E, § 656.50, are deleted.

Finally, Section 415(b) of the ACWIA provides that these special prevailing wage provisions apply to computations made for applications filed on or after the date of enactment of the ACWIA, and to applications filed earlier ''to the extent that the computation is subject to an administrative or judicial determination that is not final as of such date.'' Thus, as discussed above, the amendments made to §§ 655.731(a)(2) and 656.40 are effective immediately, and apply to all cases in which the determination of the prevailing wage was not yet finally determined administratively pursuant to the regulations at Parts 655 and 656. Moreover, they are applicable to any cases pending in Federal court which were not finally decided where the prevailing wage determination was under review, as of the date of enactment.

O. What H–1B Regulatory Matters, in Addition to the ACWIA Provisions, Are Addressed in This Interim Final Rule?

In the NPRM, the Department re-published for further notice and comment some of the provisions of the Final Rule promulgated in December 1994 which had been proposed for comment on October 31, 1995, during the pendency of the *NAM* litigation. That litigation resulted in an injunction against the Department's enforcement of some of these provisions on Administrative Procedure Act procedural grounds (*National Association of Manufacturers* v. *Reich,* No. 95–0715, D.D.C. July 22, 1996).

As explained in the NPRM, some of the provisions of the Final Rule were modified in the NPRM in light of ACWIA requirements and others in light of comments received in response to the October, 1995 proposal.

This Interim Final Rule is based on the Department's consideration of all comments received, both on the 1995 proposal and the recent NPRM.

1. What Are the Standards or Restrictions for Placement of H–1B Workers at Locations Other Than Those Identified on the Original LCA? (§ 655.735)

In the NPRM, the Department dealt separately with three related matters concerning the work locations of H–1B workers and the movement of such workers to new locations. These matters, which are of significant concern to users of the H–1B program, were: the regulation concerning short-term placement of H–1B workers at worksites not covered by any LCA (NPRM Section O.1); the interpretation of the term ''place of employment''/''worksite,'' which affects many of the employer's LCA obligations (NPRM Section P.1); and the interface among the regulatory provisions affecting the ''roving'' or ''floating'' of H–1B workers away from their home base worksite(s) (NPRM Section P.2). Because the reactions of commenters indicated some confusion about the interplay among these three matters, they are addressed in the following combined discussion.

a. What Are the Opportunities and Guidelines for Short-Term Placement of H–1B Workers at Worksite(s) Outside the Location(s) Listed on the LCA? (NPRM Section O.1)

Regulations to authorize short-term placement of H–1B workers at places of employment outside the areas of intended employment listed on the employer's LCA(s) were first published by the Department in the December 20, 1994 Final Rule. The structure and application of this short-term placement option assumes that the new location to which an H–1B worker is sent is, in fact, a ''place of employment'' or ''worksite'' for that worker. However, as discussed below, not every physical location at which an H–1B worker's duties are

performed will constitute a ''worksite'' for that worker (see subsection b, below). It is important for employers to recognize that if the location is not a ''worksite'' for that H–1B worker, then the short-term placement provision will not be applicable to that worker at that location and, consequently, the placement of the worker there will not be subject to the requirements of this section of the regulation (see IV.O.1.b and c, below). The following discussion of the short-term placement option is, therefore, based on the assumption that the H–1B worker(s) will be temporarily placed at worksites which are not covered by an LCA.

Prior to promulgation of the short-term placement option, an employer was not permitted to employ a worker at a worksite in any area unless the employer had a certified LCA covering that area of employment. Section 655.735(b)(4) of the 1994 Final Rule provided the short-term placement option, whereby ''the employer's placement(s) of H–1B nonimmigrant(s) at any worksite(s) in an area of employment not listed on the employer's labor condition application(s) shall be limited to a cumulative total of ninety (90) workdays within a three-year period, beginning on the first day on which the employer placed an H–1B nonimmigrant at any worksite within such area of employment.'' This provision was intended by the Department to allow employers greater flexibility in deploying their H–1B workers in response to business needs and opportunities in new areas. The Department recognized that an employer could, in any such situation, choose to file a new LCA covering the new worksite at which it intended to place H–1B workers. However, the Department sought to provide a mechanism by which an employer—desiring to move its H–1B worker(s) quickly, or contemplating a temporary operation in a new location—could be accommodated under the program without the delay or obligations involved in filing a new LCA. With that goal in mind, the regulation authorized an employer to use H–1B worker(s) at worksite(s) in an area of employment not covered by an existing LCA for a total of 90 workdays within a three-year period, without having to file a new LCA for that new area. Essentially, the Department created a limited exception to the rule that there must be an LCA covering every worksite at which an H–1B worker is employed. By creating this exception, the Department enabled employers wishing to use H–1B worker(s) to respond immediately to an opportunity or a problem in a non-LCA location without waiting to prepare and file an LCA for that location. If the situation requiring quick response by H–1B worker(s) was resolved within the regulation's ''short-term'' window, then a new LCA would never be required. If, on the other hand, the H–1B worker(s) would be needed at worksite(s) in the new area for a longer period of time, the employer would have ample time to prepare and file a new LCA while already using the H–1B worker(s) there. The ''short-term'' placement regulation set forth in the 1994 Final Rule specified that the ''short-term'' 90-day period would be calculated by totaling all days of work by all the employer's H–1B workers in the area of employment (covering all worksites within that area), beginning with the first workday of any H–1B worker at any worksite in that area. The 90-day period was applied separately to each new area of employment (*i.e.,* a separate 90-day period was available for each new city or commuting area).

This provision was enjoined because of lack of appropriate notice and comment, in the NAM decision. In the meantime, the provision was published for comment in the October 31, 1995, Proposed Rule. The Department received eight comments in response to the 1995 proposed rule. All eight commenters considered the proposed ''short-term'' placement option to be unworkable. Several commenters (ACIP, Intel, Microsoft, Motorola, NAM) described this option as particularly burdensome to employers with many employees in positions where movement is required as a normal incident of job duties.

ACIP, Intel, and Microsoft commented that large employers, with many employees dispersed over a number of worksites, did not have the practical ability to keep track of cumulative work days for H–1B workers for every location to which the employees travel for business. Microsoft added that the ''short-term'' placement option effectively prevented H–1B employees from participating in joint development projects with development partners. Microsoft recommended that the rule be revised to increase the number of short-term placement days from 90 to 180 and that the regulation impose the time test on a per employee basis, rather than on a location basis; apply it to a specific worksite and not any worksite within the area of employment; and require a new LCA only when the principal place of employment is changed. Intel and ACIP recommended that the Department revise its approach to the roving employee to one which differentiates between companies that are dependent on foreign workers (employee base is comprised of more than 15 percent H–1B workers) and those that are not dependent. Such a system, Intel opined, would enable the Department to better focus its enforcement activities, while not penalizing non-dependent employers with excessive paperwork. ACIP further suggested that additional paperwork requirements should apply only when travel to another location involves ''performance of services'' and the H–1B worker does not remain under the ''sole control'' of the H–1B employer. ACIP also suggested that additional H–1B workers should be able to travel to any location for which an LCA is already on file for that employer and occupation, without any additional paperwork. AILA and NAM objected to the cumulative nature of the proposed rule and its application to an entire area, rather than to a given work site. ACIP, along with Coopers & Lybrand and CBSI, recommended that the 90-day limit should apply to one employee at one specific worksite, rather than for all of the employer's H–1B workers.

Based on the comments received in response to that 1995 publication, the 1999 NPRM proposed and requested comments on a modified version of the provision—allowing the employer to utilize the ''short-term'' placement option in an area of employment without an LCA until any individual H–1B worker works for 90 days at any worksite or combination of worksites in the area of employment. Under the proposal, the 90 workdays would be counted on a per-worker basis. The proposal specified that as soon as one H–1B worker has worked more than 90 workdays within that area of employment, no more work can be performed by any H–1B worker at any worksite in that area unless, and until, the employer files and ETA certifies an LCA for the area. In other words, the entire workforce and all worksites in the area of employment would be subject to a new LCA once any one H–1B worker has worked 90 days in a three-year period in the area.

Twenty commenters addressed the NPRM revisions to the short-term placement rule, including those who commented in both 1995 and 1999.

The AFL-CIO objected to the existence of a short-term placement option. It expressed the view that the Department had given H–1B employers an unnecessary and harmful ''benefit of the doubt'' in the proposed regulation, and that employers may use short-term placement to avoid prevailing wage and notice requirements.

Several commenters considered the rule to be complex and burdensome for employers. Seven commenters (ACIP, AILA, Cowan & Miller, Rubin & Dornbaum, White Consolidated Industries, Network Appliance, FHCRC) stated that the Department's proposal unrealistically requires the human resources staff at a large company to keep track of personnel movement from multiple divisions or offices to various customer sites around the country. Three commenters (Senators Abraham and Graham, Congressional commenters, and Oracle) stated that the Department has no authority, explicit or implicit, to impose what they believe is a complex monitoring requirement under the rule.

AILA stated that the Department's proposed modification to the rule was unresponsive to employers' fundamental concerns. AILA recommended that the regulation should have no bright-line test for the amount of time constituting temporary placement versus permanent re-assignment to the new non-LCA worksite. AILA suggested that the distinction between temporary and permanent placement should be based ''on all of the facts and circumstances of the situation,'' including such facts as whether the H–1B worker's ''place of abode'' has changed, whether the worker's business card shows the new work address, and whether the worker has a phone line and work station at the new worksite. AILA also suggested that, if a time test were to be used in the regulation, it should operate as a presumption rather than a bright-line rule (*i.e.,* once the time limit had been reached, a presumption would arise that the worker's place of employment had changed, but the employer could rebut the presumption by showing that the placement was temporary in light of the facts and circumstances). Further, AILA suggested that the determination of temporary versus permanent placement should be examined in an enforcement context, rather than be subject to a bright-line rule.

Eight commenters expressed concerns regarding the proposed regulation's time test of 90 cumulative workdays for any H–1B worker over a three-year period. Four commenters (ACIP, AILA, Oracle and SBSC) stated that limiting an individual worker to an average of 30 workdays per year (90 days over a three-year period) in any one geographic area would severely limit a company's ability to do business in the area. Two commenters (ACIP, AILA) stated that 90 workdays over three years is unreasonable; they suggested that the regulation allow 90 days per year rather than 90 days over three years (*i.e.,* three times the cumulative workdays stated in the NPRM time test). Three commenters (ACIP, ITAA, and Hammond) suggested that the time test be applied to each H–1B worker for each worksite (*i.e.,* the 90-day count would restart if the worker moved to a different worksite within the same area of employment, and one worker's accumulation of 90 workdays would have no effect on the rest of the employer's H–1B workforce in that area). In this regard, two commenters (Hammond, ACIP) commended the Department's modification of the regulation to provide for a workday count on a worker-by-worker basis (rather than a cumulative count of all workdays of all of an employer's H–1B workers in the area of employment), but ACIP nevertheless asserted that the modified regulation was unworkable since large employers do not track workers in such a manner. Two commenters (University of California, ACE) stated that the limitation of 90 cumulative workdays in a three-year period may have an adverse effect on academic researchers, whose research activities would not likely exceed 90 consecutive days but may require more than 90 cumulative workdays in a three-year period. These commenters suggested an exception to the time test, for researchers working for higher education institutions, government labs and research affiliated units for activities directly related to their research where the research requires travel and work at sites that have one of a kind equipment.

The Department has carefully considered the views of the AFL–CIO, which objected to the existence of the short-term placement option because of the potential for employer avoidance of H–1B program obligations applicable to the workers' new worksites. The Department shares this concern that employers' obligations be met and that U.S. workers be protected through the prevailing wage and notice requirements. However, the Department believes that it is appropriate and important to provide H–1B employers with a regulatory mechanism to accommodate legitimate business needs while, at the same time, preserving the program's protections. Without the regulation's short-term placement option, an employer would, quite literally, be unable to place any H–1B worker at any worksite that is not already covered by an LCA; the employer would have to prepare and file an LCA and await ETA certification prior to dispatching any H–1B worker(s) to such a worksite. Considering the fast pace of business—especially in industries such as information technology—the delay involved in the LCA process could handicap an employer which needed to use its H–1B workers to respond to a business need or opportunity at a non-LCA worksite. The Department considers the short-term placement option to be a reasonable means by which the employer may meet its obligations both in its business and in the H–1B program. This option allows the employer to move its H–1B worker(s) quickly, but also requires that the employer continue to comply with H–1B standards (*e.g.,* paying ''home base'' wages plus travel expenses to H–1B worker(s) in short-term placement). By setting a limitation on short-term placements, the regulatory provision also assures that the employer which needs to use its H–1B worker(s) at the new worksite beyond such a time-frame will have to fully comply with all statutory obligations for that location (*e.g.,* provide notice, obtain local prevailing wage rate and make any pay adjustments needed to meet that rate).

The Department recognizes that some employers and interest groups view the short-term placement option as impractical and burdensome. These commenters view the regulation as requiring employers to keep detailed records of placement of H–1B worker(s) to non-LCA worksite(s) in order to ensure that the workday limit is not exceeded by any worker. The Department considers it important to emphasize that the short-term placement regulation creates an option for the employer, and that no employer is required to use this provision. Further, the regulation does not impose any recordkeeping requirements on an employer that chooses to make short-term placements; the employer may utilize any appropriate means to ensure that the workday limit is not exceeded. Obviously, an employer may avoid all the perceived ''burdens'' of the short-term placement regulation simply by withholding its H–1B worker(s) from all non-LCA worksites until after the LCA filing process is completed and the worker(s) can be sent to the new worksites pursuant to new LCAs. Or, an employer may promptly file a new LCA when the first H–1B worker is sent to a non-LCA worksite, so that the LCA is certified well before the workday limit is reached.

The Department also reminds employers that—regardless of whether they are taking advantage of the short-term placement option—they are obliged to be vigilant in maintaining their compliance with the H–1B

program's requirements, many of which are worksite-specific. The Department presumes that employers are taking appropriate steps to assure such compliance, which would logically include the employer's being aware of the locations of its H–1B worker(s). An employer which is unable to determine the whereabouts of its H–1B worker(s) would be handicapped in assuring that the worker(s) are employed in full compliance with an approved LCA (*e.g.,* worksite notice, strike/lockout prohibition, local prevailing wage rate) or in accordance with the short-term placement option (*e.g.,* workday limitation, travel costs).

The Department has carefully considered but is unable to accommodate the suggestion that the short-term placement option have no ''time test'' but, instead, allow a *post hoc* determination of temporary versus permanent placement based on ''all the facts and circumstances.'' Such an approach would, in the Department's view, be too vague to be effective from either the employer's or the worker's perspective. A bright-line test, based on workdays, affords certainty to the employer and to workers regarding applicable standards (e.g., clarity as to when a new prevailing wage or notice would be needed).

After fully considering the commenters' views, however, the Department has concluded that the NPRM's time test—90 cumulative workdays for any one H–1B worker at any worksite or combination of worksites in one area of employment over a three-year period—should be modified to provide a more reasonable accommodation for employers' business needs. In the Interim Final Rule, the Department has maintained the worker-by-worker count of workdays (which most commenters endorsed) and has made an annual allocation, rather than a three-year accumulation, of workdays (which several commenters suggested). In addition, the Interim Final Rule incorporates the concept of short-term placement being determined, in part, based on facts such as the H–1B worker's maintenance of his/her workstation at the ''home office,'' as indicated by one of the commenters. Using these concepts, the Interim Final Rule provides that an employer may make a ''short-term'' placement or assignment of an individual H–1B worker at any worksite or combination of worksites in a non-LCA area for a total of 30 workdays in a one-year period (either the calendar year or the employer's fiscal year, whichever the employer chooses). The Rule also provides that the placement may be expanded by as much as an additional 30 workdays (thus, 60 workdays in a one-year period) if the employer is prepared to show that the worker maintains a workstation at the home office, spends a substantial amount of time at the home office, and maintains his/her ''place of abode'' in the area of the home office. Thus, under this regulation, the employer would be able to place an individual H–1B worker at worksite(s) in a non-LCA area for as many as 60 workdays in a one-year period, and have that placement be considered ''short-term'' so as not to trigger the requirements for filing and complying with a new LCA for the area of employment. Once an H–1B worker exceeds the workday limitation in a one-year period, the employer would not be permitted to continue the placement of that worker or any other H–1B worker in the same occupation in that area of employment, until one year from the beginning of the next one-year period (either the beginning of the next calendar year, or the beginning of the employer's next fiscal year) or until an LCA is in place.

The Department believes that any greater presence by an employer's workforce in an area cannot be considered short-term and should require the employer both to provide notice to the local workforce and to pay local prevailing wages. Under the Interim Final Rule, the employer may choose how to use the annual available workdays in placing an H–1B worker ''temporarily'' at worksite(s) in the area of employment (*i.e.,* use them all consecutively, or at different times within one year). While some other measurement might have been preferred by some commenters, the Department believes that, as a matter of common sense and fairness, a worker's placement at a worksite for more than the equivalent of 12 normal workweeks in a calendar year (60 workdays, five-day work weeks) cannot reasonably be characterized as ''short-term,'' whether the workdays are taken in one block or spread over a period of time.

The Department recognizes that some commenters have criticized the regulation as being confusing and difficult to use. Therefore, the Interim Final Rule contains clarifying changes which make the provision more user-friendly. For example, the Rule includes a definition of the ''one-year period'' for short-term placements (*i.e.,* either the calendar year or the employer's fiscal year, whichever the employer chooses) and provides a clear description of the employer's choices of actions when the time limit for short-term placement has been reached (*i.e.,* file an LCA to continue using H–1B workers, or discontinue use of H–1B workers until the next one-year period begins). These clarifications—made in response to commenters's concerns—do not affect the substantive requirements of the regulation.

The Department has concluded that the same standards should apply to all H–1B employers. A profusion of time tests and rules for different industries or types of employers would increase the complexity of the regulation without appreciable benefit in achieving the purposes of the program. The employer's option of timely filing an LCA for the location should alleviate any ''burdens'' which might otherwise argue for special rules or exceptions for certain industries.

One commenter (ACIP) suggested that the regulation should authorize employers to use a ''national LCA'' which would permit free movement of H–1B workers to any and all worksites around the country without the need to monitor the number of workdays at any particular worksites. According to ACIP, some employers pay a wage which is greater than the prevailing wage in any part of the country, as measured by the OES survey, the source of prevailing wage determinations issued by the Employment Service, or other published, nationwide data sources, so that their placements of H–1B workers at any worksites (whether temporarily or permanently) would have no adverse impact on local wages. Since this concept of a ''national LCA'' was not set forth for notice and comment in the NPRM, the Department cannot consider the matter for purposes of the Interim Final Rule. However, the Department is of the view that the concept warrants consideration. The Department, therefore, proposes it here for comment and possible inclusion in the Final Rule. In particular, the Department seeks comments as to whether such an LCA would be feasible under the statutory scheme, and also seeks information and suggestions as to how such an LCA would address each of the statutorily-prescribed attestation elements (*e.g.*, collective bargaining notice or worksite notice; local prevailing wage rates; strike/lockout).

The Department wishes to emphasize that it considers the various components of the short-term placement rule to be non-severable. After the injunction was issued by the court in *NAM*, some confusion arose concerning the effect of the injunction—*i.e.*, whether short-term placements were permitted without any time restriction, or whether employers would be required to place H–1B workers only at worksites in areas of

employment with certified LCAs. The Department has approached this matter on a case-by-case basis, taking into account the confusion created by the *NAM* decision. However, with the issuance of this Interim Final Rule, the Department considers all such confusion to have been dispelled. Therefore, the Department cautions employers that—except in accordance with the strict requirements of the short-term placement option—the H–1B provisions of the INA and the Department's regulations require that an LCA be filed for any and all worksites where H–1B workers are employed. Violations of any of the provisions of the short-term placement option will result in its inapplicability in its entirety.

i. When Is the Short-Term Placement Option Available? (§ 655.735)

As explained in the NPRM, the short-term placement option would be available only when an employer wants to send its H–1B worker(s) who are already in the United States under an H–1B petition supported by an LCA filed by the employer to a new worksite which is in an area of employment for which the employer does not have an LCA in effect for the occupation. After the 90-workday limit is reached by any one H–1B worker, the short-term placement option would no longer be available for any H–1B worker(s) for any worksite in that area of employment; the employer would be required to have an LCA in effect for the new area and to be in full compliance with all the LCA requirements. The NPRM explained that the short-term placement option would not be available where the H–1B worker has just arrived in the United States (or has adjusted status), in which case the worker must be placed at a place of employment listed on the LCA supporting the H–1B petition for the worker. In addition, the short-term placement option would not be available where the employer is moving its H–1B worker(s) among worksites in one or more areas covered by valid LCAs; the worker(s) would be subject to the requirements of those LCAs (*e.g.*, notice, prevailing wage, non-displacement for dependent employers) that cover those worksites. For example, as the NPRM explained, the short-term placement option cannot be used where the employer has an LCA in effect for an area of employment in order to avoid ''overcrowding'' the LCA with H–1B workers. As a matter of enforcement discretion in determining whether a violation exists in an ''overcrowded'' LCA situation, the Department will look at all the facts and circumstances in order to determine whether the employer is acting in good faith to assure compliance with the program, including taking steps to file new LCA(s) and rectify the overfilling of the numerical limitation specified by the employer itself on the initial LCA(s).

The Department received three comments addressing the specifics of the availability of the short-term placement option. ACIP commended the Department for demonstrating flexibility and for clarifying that an employer may file LCAs with multiple, open slots and use those slots for roving employees. However, ACIP sought clarification that short-term placements under the 90-workday rule do not ''fill'' an open LCA slot. ACIP also sought clarification of the NPRM discussion of the temporary placement of H–1B workers ''overfilling'' a valid LCA, particularly concerning the Department's use of enforcement discretion in such situations. ACIP suggested that, due to the lengthy processing time of LCAs, the Department should permit the employer to ''overfill'' an LCA. The second commenter, ITAA, stated that, in its view, the Department's past practice was to ignore ''LCA overcrowding'' if the employer met the notice and wage requirements for each worker at the site. ITAA observed that, under the proposed regulation, the Department stated an intention to use its enforcement authority and cite violations for ''LCA overcrowding'' if the number of H–1Bs ''significantly exceeds'' the number of openings listed on the LCA. ITAA anticipated that DOL would assess penalties for ''misrepresenting a material fact'' or a ''substantial failure'' to accurately list the information on the LCA. Therefore, ITAA requested a definition of ''significant'' overcrowding of the LCA. The third commenter, Latour, suggested that the Department be flexible regarding ''overfilled'' LCAs and consider employers' explanations in those situations where the ''overfill'' is significant.

As for the concerns of the commenters regarding the potential use of the short-term placement option to deal with situations of ''overcrowded'' or ''overfilled'' LCAs, the Department points out that the statute expressly requires that the employer's LCA ''specif[y] the number of workers sought,'' and further provides that a substantial failure to comply with this requirement can result in the assessment of a $1,000 civil money penalty and one-year debarment (8 U.S.C. 212(n)(1)(D) and 212(n)(2)(C)(i)). The number of H–1B workers taking jobs in a local labor market is a matter which Congress obviously considers to be significant, and the Department cannot set aside the statutory requirement that the employer accurately attest to this specific information. The Department is not aware of serious problems concerning overcrowded LCAs since the H–1B program's inception. Thus, the Department has used, and will continue to use, a rule of reason in assessing such situations; violations will not be cited as long as the employer is showing good faith and is taking steps to come into compliance. The determination would necessarily be made on a case-by-case basis, and it is not feasible to issue bright-line rules such as some particular degree of overcrowding which would be tolerable.

With respect to the query as to whether the use of the short-term placement option would affect the ''overcrowding'' determination, the Department emphasizes that where an LCA is in effect, the short-term placement option is simply not applicable. The LCA's terms—including its specification of the number of H–1B workers to be employed in the area—are binding on the employer, except with respect to an H–1B worker who moves into and out of the area without establishing a ''worksite'' there (see IV.O.1.b, below).

ii. What Are the Standards for Payment of the H–1B Worker's Travel Expenses Under the Short-Term Placement Option? (§ 655.735(b)(3), Previously Set Forth in Appendix B, Section a)

A component of the proposed short-term placement option is the requirement that employers who wish to avail themselves of this option pay travel-related expenses at a level at least equal to the rate prescribed for Federal Government employees on travel or temporary assignment, as set out in the General Services Administration (GSA) regulations. The NPRM explained that the GSA standards were used as a benchmark because the Department believes that some basic, universally available measures are needed, and because the GSA standards (based on surveys of travel costs) are appropriate for this purpose. The NPRM proposed to modify the provisions in the current Final Rule (enjoined by *NAM*), so as to better explain the uses of the GSA standards (*e.g.*, no payment to the worker for lodging would be required where the worker actually incurs no lodging costs).

The nine commenters on this proposal (ACIP, AILA, Cowan & Miller, Hammond & Associates, Intel, ITAA, Latour, Rubin & Dornbaum, White Consolidated Industries) were

unanimous in their opposition to a regulation that would require employers to have separate travel reimbursement standards for H–1B workers than for other employees. These commenters suggested that the standard for H–1B workers, like all other workers, should be reimbursement for actual expenses incurred while on travel.

The Department has fully considered these comments, as well as its own post-*NAM* enforcement experience. During the post-*NAM* period, when the regulation has been enjoined, the Department has been enforcing actual expense reimbursement for all H–1B business travelers. In these enforcement proceedings, the Department has not encountered problems pertaining to abusive practices or difficulties in proof of actual expenses, since it has found that employers in fact keep a record of expenses as a prudent business practice. Therefore, the Department is adopting the commenters' recommendation. The regulation is modified in this Interim Final Rule to specify that employers who use the short-term placement option must reimburse H–1B workers for the actual expenses incurred during their short-term placement. In those rare instances where the employer, in an enforcement action by DOL, is unable to demonstrate the actual expenses incurred, the Department will use the GSA standards to determine whether the reimbursement was sufficient and to assess back wages if appropriate.

b. What Constitutes an H–1B Worker's ''Worksite'' or ''Place of Employment'' for Purposes of the Employer's Obligations Under the Program? (NPRM Section P.1) (§ 655.715)

The H–1B program's requirements largely focus on the H–1B worker's ''place of employment'' or ''worksite.'' That location controls the prevailing wage determination, identifies where the employer must provide notice to workers, and specifies the scope of the strike/lockout prohibition. A location which is not a worksite, on the other hand, would not trigger those requirements, even if the H–1B worker were at that location in the course of the performance of job duties. The NPRM echoed the previous rules issued under this program at § 655.715, which define ''place of employment'' as ''the worksite or physical location where the work is actually performed.'' However, the NPRM provided further interpretation of this term (as part of proposed Appendix B to Subpart H of the regulations), in an effort to better inform the users of the program and to alleviate some apparent confusion on this matter.

The proposed guidance was in response to some employers' concern that a strict or literal application of the ''place of employment''/''worksite'' definition could lead to absurd and/or burdensome compliance requirements with regard to the employer's obligation of providing required notice and adjusting the H–1B worker's wages to comply with different prevailing wages for work at various locations. Employers raised questions regarding whether the ''worksite'' definition would be applicable (thus either causing the worker's time at that location to be counted towards the 90-workday ceiling, or triggering compliance obligations under an LCA covering that location) where an H–1B worker has a business lunch at a local restaurant, or appears as a witness in a court, or attends a training seminar at an out-of-town hotel.

The NPRM, in Appendix B, proposed that the term ''place of employment'' or ''worksite'' does not include any location where either of two criteria is satisfied:

1. An H–1B worker who is stationed and regularly works at one location is temporarily at another location for a particular individual or employer-required developmental activity such as a management conference, a staff seminar, or a formal training course (other than ''on-the-job-training'' at a location where the employee is stationed and regularly works). For the H–1B worker participating in such activities, the location of the function would not be considered a ''place of employment'' or ''worksite,'' and such location—whether owned or controlled by the employer or by a third party—would not invoke H–1B program requirements with regard to that worker at that location. However, if the employer uses H–1B nonimmigrants as instructors or resource or support staff who continuously or regularly perform their duties at such locations, the locations would be ''places of employment'' or ''worksites'' for any such workers and, thus, would be subject to H–1B program requirements with regard to these workers.

2. The H–1B worker's presence at that location satisfies three requirements regarding the nature and duration of the worker's job functions there—

a. The nature and duration of the H–1B worker's presence at the location is due to the fact that either the H–1B worker's job is by nature peripatetic, in that the normal duties of the worker's occupation (rather than the nature or the employer's business) require frequent travel (local or non-local) from location to location, or the H–1B worker spends most of the time working at one location but occasionally travels for short periods to other locations; and

b. The H–1B worker's presence at the locations to which the worker travels from the ''home'' worksite is on a casual, short-term basis, which can be recurring but not excessive (*i.e.*, not exceeding five consecutive workdays for any one visit); and

c. The H–1B worker is not at the location to perform work in an occupation in which workers are on strike or lockout.

The NPRM provided examples to illustrate these criteria, and explained that for an H–1B worker who performs work at a location which is a non-worksite (under either criterion 1 or criterion 2), the ''place of employment'' or ''worksite'' for purposes of notice, prevailing wage and working conditions is the worker's home base or regular work location. Further, the NPRM stated that, in applying this interpretation of ''place of employment'' or ''worksite,'' the Department will look carefully at any situations which appear to be contrived or abusive, such as where the H–1B worker's purported ''place of employment'' is a location other than where the worker spends most of his/her time, or where the purported ''area of employment'' does not include the location(s) where the worker spends most of his/her time.

The Department received nine comments on the NPRM ''worksite''/''place of employment'' proposal.

Several commenters addressed the general matter of whether the proposed Appendix B guidance was appropriate. Senators Abraham and Graham and Oracle remarked that ''place of employment'' is a term with a plain meaning (in their view, the location where the individual is employed); they stated that, in modern commerce, workers employed in one location frequently must travel to other locations to perform their duties and that, when they do so, they are not employed there but are merely visiting. Rapidigm, a staffing firm, requested a clearer definition of ''worksite,'' and asked whether the amount of time spent at a location is the only factor, regardless of the nature of the work or who has control or supervision of the worker. AILA urged that the proposed Appendix B be dropped because, in its view, it creates an absurd result and is ''micromanagement'' by the Department.

A number of commenters (ACIP, Intel, ITAA, Latour, Godward) expressed their approval of the Department's recognition that not all activities engaged in by a worker occur at a ''worksite.'' However, some commenters

were dissatisfied with the NPRM's proposal of five consecutive workdays as the test for a ''casual, short-term'' stay for purposes of a non-worksite visit by an H–1B worker. ACIP, Intel and ITAA stated that this standard is overly restrictive and unrealistic. ACIP suggested that the Department should not be concerned with the length of stay, as long as the worker is engaged in non-worksite activities; ACIP recommended that, if a duration-of-stay standard was adopted, it should be 10 workdays at least. ITAA expressed a similar view that ''casual, short-term basis'' should be defined to include visits of up to10 consecutive work days to accommodate training courses, business seminars, and other events which may last between five and 10 days. Intel recommended that the focus should be on the purpose of the trip, rather than on the length of stay.

The Department seeks to achieve the purposes of the Act which focuses its protections for workers on the ''place of employment,'' while accommodating the legitimate needs of employers using the H–1B program. The regulation, since the inception of the program, has recognized that the identification of the ''place of employment'' cannot be merely a matter of the employer's designation, since that approach would not serve the purposes of protecting workers' prevailing wages and other rights. Instead, the regulation identifies the ''place of employment'' by looking to the activities of the H–1B worker, defining ''place of employment'' as ''the worksite or physical location where the work is actually performed'' (20 CFR 655.715). However, the Department has determined that the regulation must afford reasonable flexibility so as to take into account the common practices of employers whose workers may have more than one ''place of employment'' over a period of time or, who may perform duties at various locations which should not, for practical reasons, be characterized as ''places of employment.'' In this regard, the Department shares the view of those commenters who observed that workers may legitimately ''visit'' locations to perform job duties without in all circumstances making those locations into ''places of employment'' for purposes of the H–1B program.

After consideration of all the comments, the Department has concluded that the five cumulative workdays standard is a reasonable and appropriate measure of a casual, short-term ''visit'' where a worker's job is by its nature peripatetic. A full, ordinary workweek of five days is, in the Department's view, a practical and reasonable measurement of a business ''visit'' by a worker performing job duties. Further, the worker may make recurring, short ''visits'' to the location, in order to perform job duties. On the other hand, the Department believes that more flexibility is appropriate for a worker who spends most of his or her time at one location but occasionally travels for short periods to other locations. Under these circumstances, the Department believes that a duration of up to 10 workdays is appropriate. The Interim Final Rule is modified accordingly.

With regard to the concern of some commenters that a five-workdays time frame would be unrealistic for developmental activities such as training and business seminars, the Department points out that there is, in fact, no time frame for developmental activities. Such activities are specifically addressed under criterion 1 rather than under criterion 2, which contains the business ''visit'' concept.

Finally, based on considerations of clarity and ease of use of the regulations, the Department has determined that the criteria for distinguishing between a worksite and a non-worksite should be included in the regulatory text which defines the statutory term ''place of employment.'' Thus, in this Interim Final Rule, this material appears in the regulation at § 655.715, rather than in Appendix B as proposed.

c. Under What Circumstances May an H–1B Worker ''Rove'' or ''Float'' From His/Her ''Home Base'' Worksite? (NPRM Section P.2 and Proposed Appendix B, section b)

The statute and regulations do not permit the employment of H–1B workers as ''roving'' or ''floating'' employees for whom no particular LCA, and thus no specific set of LCA requirements, would be applicable. However, as explained in the NPRM, the Department recognizes that some employers need to move their H–1B workers from place to place in order to meet the needs of clients or to respond to business problems and opportunities. This practice of moving H–1B workers is sometimes described as having the workers ''rove'' or ''float'' from a ''home base'' worksite. To assist employers in understanding how this practice can be accommodated under the program, Appendix B of the NPRM proposed guidance concerning the three circumstances in which an H–1B worker could legitimately ''rove'' or ''float'' from his/her home base worksite to perform job duties at some other location. This guidance, like the other provisions of proposed Appendix B, was initially developed as interpretive guidance that the Department had planned to issue independently of the regulations.

The Department received two comments on its proposed guidance.

AILA urged that the Appendix B guidance be dropped, because it considered both the ''rove''/''float'' discussion and the interpretation of ''worksite'' to be attempts by the Department ''to micromanage employers' commerce'' through ''peculiar workplace rules.''

ITAA requested clarification concerning the interface between the Department and INS policies concerning when an LCA for a ''new'' area of employment may be substituted for the ''original'' LCA, and whether such a substitution would require the filing of a new petition. The Department recognizes that employers need clarity regarding this matter, and will consult with the INS with the intention of providing official, coordinated guidance.

The Department has concluded, upon further review, that incorporation of the interpretive guidance in proposed Appendix B, section b, into the regulation is not necessary or appropriate at this time. The Department plans to issue separate interpretive guidance explaining the inter-relationship between the various provisions regarding employment of H–1B nonimmigrant workers outside of their home work station.

2. What Are an Employer's Wage Obligations for an H–1B Worker's ''Nonproductive Time''? (See IV.H, Above)

3. What Are the Guidelines for Determining and Documenting the Employer's ''Actual Wage''? (Appendix A to Subpart H)

Section 212(n)(1)(A)(i)(I) of the INA as amended by the Immigration Act of 1990 (IMMACT 90) and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA) requires that an employer seeking to employ H–1B nonimmigrants agree that it will pay the nonimmigrants at least the higher of the prevailing wage or the ''actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.''

In explaining the amendments to the H–1B program made by MTINA, Senator Reid explained Congress intended ''specific employment to mean the specific position held by the H–1B

worker at the place of employment.'' Furthermore, by ''similar experience and qualifications,'' Congress intended consideration of ''experience, qualifications, education, job responsibility and function, specialized knowledge, and other such legitimate factors'' 137 Cong. Rec. S18243 (Nov. 26, 1991).

The Department's regulations explaining the ''actual wage'' requirement, as amended in 1992 and 1994, provide at § 655.731(a)(1) that in determining the actual wage, employers may take into consideration experience, qualifications, education, job responsibility and function, specialized knowledge, and other legitimate business factors. Legitimate business factors are ''those that it is reasonable to conclude are necessary because they conform to recognized principles or can be demonstrated by accepted rules and standards.'' The actual wage is the amount paid to other employees with substantially similar experience and qualifications with substantially the same duties and responsibilities, or if there are no such employees, the wage paid the H–1B nonimmigrant. In addition, the regulation requires that adjustments such as cost of living increases or other periodic adjustments, higher entry rate due to market conditions, or the employee moving into a more advanced level of the occupation, be provided to H–1B nonimmigrants where the employer's pay system or scale provides for such adjustments during the LCA.

The regulations further provide at § 655.731(b)(2) that the employer shall retain documentation specifying the basis it used to establish the actual wage, *i.e.,* showing how the wage for the H–1B worker relates to the wages paid other individuals with similar experience and qualifications for the specific employment at the place of employment. The documentation is also required to show that after any adjustments in the employer's pay system or scale, the wage paid is at least the greater of the adjusted actual wage or the prevailing wage. In addition, the regulations provide at § 655.760(a)(3) that the public access file shall contain ''[a] full, clear explanation of the system that the employer used to set the 'actual wage' * * *, including any periodic increases which the system may provide. * * *'' This explanation may be in the form of a memorandum summarizing the system, or a copy of the pay system or scale. Payroll records do not need to be in the public access file, but are required to be made available to the Department in an enforcement action.

The Department initially offered guidance on factors to be considered in making this determination, with examples, in the preamble to the Interim Final Rule of January 13, 1992 (57 FR 1319). This guidance, in modified form, was published as Appendix A to Subpart H in the Final Rule of December 20, 1994 (59 FR 65671). In addition to the examples set forth in the preamble to the 1992 Interim Final Rule, Appendix A provided that the employer may take into consideration ''objective standards,'' and must ''have and document an objective system used to determine the wages of non-H–1B workers.'' The Appendix further provided that the explanation of the wage system in the public access file ''must be sufficiently detailed to enable a third party to apply the system to arrive at the actual wage rate computed by the employer for any H–1B nonimmigrant.'' The portions of Appendix A relating to an objective wage system were enjoined by the court in NAM, for lack of prior notice and comment. In the meantime, the ''Appendix A'' guidance was republished for public comment in the Proposed Rule dated October 31, 1995 (60 FR 55339).

The Department republished Appendix A for further notice and comment in the 1999 NPRM, as modified to include job performance among the legitimate business factors which may be taken into consideration. The underlying regulatory provisions at §§ 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3) were not open for notice and comment. The preamble explained that under Appendix A as proposed, the employer would not be required to create or to document an elaborate ''step'' or ''grid'' type pay system, or any other complex, rigid system. Rather, the employer's actual wage system could take into consideration any objective, business-related factors relating to experience, qualifications, education, specific job responsibilities and functions, job performance, specialized knowledge and other business factors. The use of any or all of the factors would be at the discretion of the employer. All factors used in the employer's actual wage system would need to be applied to H–1B nonimmigrant workers in the same, nondiscriminatory manner as the factors would be applied to U.S. workers in the occupational classification. Further, the preamble explained that the explanation of the actual wage system in the public access file must be sufficiently detailed to enable a third party to understand how the wage system would apply to a particular worker and ''to derive a reasonably accurate understanding of that worker's wage.''

The Department received nine comments on proposed Appendix A in the 1995 Proposed Rule, and 15 (including two 1995 commenters) in response to the 1999 NPRM. Most 1995 and 1999 commenters viewed the Appendix guidance as inconsistent with the INA and demonstrating a lack of understanding of corporate pay systems. The comments focused on an employer's responsibilities in making the actual wage determination, what factors should be considered in making the determination, how the factors should be considered, when the factors should be considered, and the documentation required to enable a third party to apply the wage system to determine the actual wage rate.

Senators Abraham and Graham, the Congressional commenters, AILA (in 1995 and 1999 comments), FHCRC, Hammond, Network Appliance, Oracle, Rubin & Dornbaum, Sun Microsystems, the Massachusetts Institute of Technology (MIT) (1995 comment) and the National Association of Manufacturers (NAM) (1995 comment) contended that the INA does not require, nor did Congress intend, that employers be required to create and document an objective wage system for their U.S. workers to meet the requirement to pay H–1B workers no less than the greater of the actual or prevailing wage. AILA indicated further that the INA requires the actual wage to be paid only to H–1B workers, and does not dictate the wages of U.S. workers. NAM indicated that this requirement ignores the realities of how businesses establish salaries and epitomizes regulatory overreach.

Several commenters (AILA, ACIP, Kirkpatrick & Lockhart, Latour and Sun Microsystems) disagreed with the Appendix A requirement that an employer use only objective factors in determining the actual wage while others offered suggestions on factors to be considered. Kirkpatrick & Lockhart indicated that by limiting this determination to objective factors, the Department was eliminating an employer's discretion in hiring and ignoring the reality that subjective as well as objective factors are evaluated in compensating employees in the corporate world. Frost & Jacobs (1995 comment) suggested that the Department include ''performance level'' as a legitimate business factor in determining actual wage. ITAA agreed with the Department's addition of ''job performance'' as an acceptable business factor in the January 5, 1999 NPRM.

After carefully considering all the comments, the Department has concluded that Appendix A—which was created in response to employers' requests for technical guidance—has not served its intended purpose and has, instead, caused some confusion. The Department has, therefore, decided that Appendix A will not be included in the Interim Final Rule. The controlling standards for determining and documenting an employee's ''actual wage'' are contained in the current regulation, 20 CFR 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3) (none of which were opened for comment in the NPRM). If the need arises in the future, the Department, as appropriate, will provide compliance advice or technical assistance further explaining the current regulation.

The commenters' reactions to the proposed Appendix A are based, in large part, on a lack of understanding of the fact that the Department's regulations (20 CFR 655.731(a)(1), 655.731(b)(2), and 655.760(a)(3))—which the proposed Appendix A was intended to explain and clarify—do not direct employers to develop a special corporate-wide wage system specifically to support the employment of H–1B nonimmigrants. The Department agrees with the commenters that section 212(n)(1)(A)((i)(I) of the INA does not require an employer seeking H–1B nonimmigrants to create an objective wage system for its U.S. and H–1B workers. The Department is imposing no obligation to create such a system.

Section 655.760(a)(3) requires that the factors used be legitimate business factors such as experience, qualifications, education, specific job responsibilities and functions, specialized knowledge, and job performance. The use of any or all of these factors is at the discretion of the employer. Whatever factors are used in the employer's actual wage system must be applied to H–1B nonimmigrant workers in the same, nondiscriminatory manner that they are applied to U.S. workers. Furthermore, the factors applied must relate to the statutory standard, *i.e.,* the workers' experience, qualifications, and job duties. Accordingly, it is the Department's position that an employer may not differentiate between the pay of H–1B and U.S. workers based on market forces, such as the lowest wage a worker is willing to accept. Similarly, it is inappropriate for an employer to consider factors which are not relevant to the job and which are not uniformly applied to H–1B and U.S. workers.

The Appendix A guidelines were drafted under the presumption that all U.S. businesses use wage systems to determine professional salaries that consider various legitimate business factors. The Department drafted Appendix A to limit the actual wage determination to objective legitimate business factors already being used by the employer because such factors could reasonably be used by the Department in its enforcement to compare H–1B nonimmigrant and U.S. workers in the specific employment in question. Although the Department remains concerned about the inherent difficulty in comparing the pay of workers based on subjective factors, it is persuaded that some subjective factors, such as an evaluation of performance levels, may be legitimate business factors used in setting the actual wage. However, pursuant to § 655.760(a)(3), the employer continues to be required to describe the wage system it used to determine the actual wage paid to H–1B nonimmigrants.

AILA and NAM (1995 comments) disagreed with the requirement that an employer establish the actual wage based on the ''occupation'' in which the H–1B nonimmigrant is employed. The commenters stated that the statute requires that H–1B workers be paid at least (the greater of the prevailing or) actual wage of those with similar qualifications and experience employed in the ''specific employment'' in question, a smaller group than dictated by the NPRM. Therefore AILA suggested that employers should be required to analyze which jobs are comparable for actual wage purposes, and pay the H–1B worker at least as much as the employees in those jobs.

The Department agrees that an employer must determine which workers are the subject of comparison with the H–1B worker in order to determine the actual wage required to be paid, at a minimum, to the H–1B worker. The Department also agrees that the appropriate actual wage determination comparison for H–1B nonimmigrants is to ''individuals with similar experience and qualifications for the specific employment in question'' and not ''occupation.'' However, in many circumstances this comparison can only be made if the Department is able to review the employer's compensation system for employees in the occupational category, since the employer's compensation system for other employees in the same occupation bears directly on determinations of the actual wage required to be paid for the specific employment in question.

Intel (1995 comments) and Microsoft (1995 comments) suggested that the Department allow blanket approval—as meeting actual wage requirements—for large employers with established ''total compensation'' wage systems which meet certain requirements such as executive bonuses and profit sharing supplements to base salary. The Department disagrees with this suggestion. The Department is charged with enforcement of the statutory requirement that the employer pay the H–1B worker(s) the higher of the actual or prevailing wage. Such enforcement includes a determination that H–1B workers have, in fact, been paid at least the actual wage paid to other workers with similar experience and qualifications for the specific employment—a determination that can only be made through an examination of the application of the employer's actual wage system. Furthermore, it would be inappropriate for the Department to make exceptions for large employers; the statute indicates no Congressional intent for differing obligations for employers depending upon the size of their workforce or the sophistication or apparent generosity of their compensation systems.

AILA (1995 comments) and NAM (1995 comments) asked how the Department can determine the actual wage in the absence of documentation by using an average (as stated in the preamble to the 1995 NPRM, 60 FR 55341), when the express language of the regulation is that the actual wage is not an average. AILA recommended that if the Department is allowed to use an average to compute the actual wage, employers should be able to use an average as well.

The Department is unable to accommodate the recommendation that employers be authorized to compute the actual wage by averaging the wages paid to employees. As stated in the preamble to the 1995 Proposed Rule, the actual wage is not an average. It reflects application of an employer's actual pay system. Use of the average by the employer would not satisfy the statutory requirement. However, the Department must have some method of determining the actual wage and calculating any back wages due H–1B workers if the employer has not documented and cannot reconstruct its actual wage system. In such circumstances, averaging the wages of non-H–1B workers may be an enforcement method of last resort. The Department would identify U.S. workers in the specific employment in question with experience and qualifications similar to the H–1B nonimmigrant and average their wages to determine the actual wage back wage assessment.

ITAA requested that an employer be permitted to set an actual wage range for a particular position, even if some H–1B workers with similar skills and education make more than others, as long as the workers are paid within the range and meet the prevailing wage requirement.

The Department agrees that an actual wage range can be used to determine compliance with the actual wage requirement, provided the employer's methodology in assigning wages within the range is based on acceptable, legitimate business factors and the methodology is applied in the same manner to H–1B nonimmigrants and U.S. workers. This should result in U.S. workers and H–1B workers with similar skills and qualifications being paid the same, where their duties and responsibilities are the same.

MIT (1995 comments), AILA (1995 comments), NAM (1995 comments), Microsoft (1995 comments), CBSI (1995 comments), Intel, and Rubin & Dornbaum objected to the requirement to update and document changes to the actual wage when the employer's pay system or scale provides for pay adjustments during the validity period of the LCA. They stated that Section 212(n)(1)(A)(i) of the INA directs that the required wage rate determination be ''based on the best information available as of the time of filing the application;'' thus an actual wage update should be required only at the time of filing the LCA. AILA further stated that to require constant reconsideration of the actual wage (like the prevailing wage) would be a massive burden on employers which Congress did not intend to impose.

The Department notes that the INA language referred to in the comments was included in the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Public Law 102–232, 105 Stat. 1733, and refers to the sources of wage information (''the best information available'') that an employer may use when reporting the appropriate wage on its LCA. 137 Cong. Rec. S18243 (Nov. 26, 1991) (Statement of Senator Simpson). As Senator Simpson stated, with the enactment of MTINA, employers were no longer required ''to use any specific methodology to determine that the alien's wage complies with the wage requirements of the Act and may utilize a State agency determination, such as SESA, an authoritative independent source, or other legitimate sources of wage information.''

The Department's interpretation of an employer's actual wage obligation as an ongoing, dynamic obligation has been the Department's position since the inception of the H–1B program, as provided by § 655.731(a)(1) of the existing regulations (which were not open for notice and comment). The regulation explains that the actual wage obligation includes adjustments in the actual wage. In response to comments on the 1993 NPRM expressing concern that infrequent prevailing wage updates would allow an employer to use ''stale'' wage data, the Department stated in the preamble to the December 20, 1994 Final Rule (59 FR 65654): ''[T]he ''actual wage rate'' has been and will continue to be a ''safety net'' for the H–1B nonimmigrant. Assuming the actual wage is higher than the prevailing wage and thus is the required wage rate, if an employer normally gives its employees a raise at year's end, or the employer's system provides for other adjustments, H–1B nonimmigrants must also be given the raise (consistent with employer-established criteria such as level of performance, attendance, etc.).'' Conversely, if no raises, bonuses, or other updates are provided U.S. workers throughout the life of the LCA, the H–1B worker is not entitled to such payments or adjustments. The Department's interpretation furthers the Congressional intent of parity in wages and benefits for U.S. workers and H–1B nonimmigrants.

Several commenters (Microsoft (1995 comment), Motorola (1995 comment), Coopers & Lybrand (1995 comment), ITAA, Intel, ACIP, and AILA expressed strong concern over the requirement that the employer's compensation system be sufficiently detailed and documented in the public access file to enable a third party to apply the system to arrive at the actual wage. The commenters contended that such a requirement is unrealistic and imposes an impossible burden on employers. Microsoft (1995 comment) recommended that the pertinent portion of Appendix A be revised to read: ''The explanation of the compensation system should be sufficiently detailed to illustrate to a third party, in the event of an enforcement action, how the employer applied the system to arrive at the actual wage for an H–1B nonimmigrant.'' MIT (1995 comment) agreed with the requirement of an equitable wage system for all employees, and recommended that the wording of the provision be changed to indicate that only a general explanation of the compensation system be provided. Similarly, Intel recommended that the employer be required to provide a general description of its compensation system sufficient to enable a third party to clearly understand how wages were determined. Intel also stated that it was unclear whether the employer had to do a detailed analysis for each LCA or an overview of the compensation system to support the third party review. ACIP and AILA indicated that it was unrealistic to expect a third party to be able to calculate a particular worker's salary based on the employer's documentation of its actual wage system. ACIP was troubled that an employer could be debarred for having inadequate documentation and urged the Department to eliminate or simplify this requirement. AILA recommended that employers should make the analysis of comparable employee, decide the appropriate documentation of the analysis, and leave the rest to enforcement.

The Department is persuaded that its proposed Appendix A requirement for a public access file with the detail sufficient to enable a third party to determine the actual wage rate for an H–1B nonimmigrant is an impractical requirement for employers. The explanation of the compensation system found in the public access file must be sufficiently detailed for a third party to understand how the employer applied its pay system to arrive at the actual wage for its H–1B nonimmigrant(s). It is the Department's view that although third parties may not have the information needed to arrive at the specific actual wage for the H–1B nonimmigrant(s), the information should be sufficient to allow them to make a judgement on the potential for an actual wage problem. At a minimum, the description of the actual wage system in the public access file should identify the business-related factors that are considered and the manner in which they are implemented (*e.g.,* stating the wage/salary range for the specific employment in the employer's workforce and identifying the pay differentials for factors such as education and job duties). Computation of U.S. and H–1B workers' particular wages need not appear in the public access file; that information must be available for review by the Department in the event of an enforcement action (such as in each worker's personnel file maintained by the employer).

4. What Records Must the Employer Keep Concerning Employees' Hours Worked? (§ 655.731(b)(1))

The Department sought further comment on proposed amendments to § 655.731(b)(1), the basic recordkeeping obligation to support an employer's

wage obligation. This provision was published for comment in the Proposed Rule dated October 31, 1995 (60 FR 55339). An earlier amendment to § 655.731(b)(1) was promulgated in the Department's Final Rule of December 20, 1994 (59 FR 65646), which was enjoined by the court in NAM, for lack of prior notice and comment.

The proposed regulation would require employers to keep specified payroll records for H–1B workers and ''for all other employees for the specific employment in question at the place of employment.'' Hours worked records would be required if (1) the employee is not paid on a salary basis, (2) the actual wage is expressed as an hourly rate, or (3) with respect to H–1B workers only, the prevailing wage is expressed as an hourly rate.

The Department has made a number of accommodations already to concerns expressed regarding the requirements of this rule, particularly in regard to the circumstances in which hours worked records must be maintained. Therefore a detailed rulemaking history is useful.

The regulations currently in effect at 20 CFR 655.731(b)(1) (1993) (i.e., the regulations which are not under injunction), require that payroll records be maintained for H–1B workers and for ''all other individuals with experience and qualifications similar to the H–1B nonimmigrant for the specific employment in question at the place of employment.'' Hours worked records are required if the employee is paid on other than a salary basis, or if the prevailing wage or actual wage is expressed as an hourly wage.

The 1994 Final Rule (set forth in the CFR, but enjoined in NAM), like the current NPRM, required that an employer maintain payroll records for H–1B workers and for ''all other employees for the specific employment in question at the place of the employment.'' Upon further consideration, the Department issued a Notice of Enforcement Position (60 FR 49505, September 26, 1995) announcing that, with respect to any additional workers for whom the Final Rule may have applied recordkeeping requirements (*i.e.,* U.S. workers in the specific employment in question who did not have similar qualifications and experience), the Department would enforce the provision to require the employer to keep only those records which are required by the Fair Labor Standards Act (FLSA), 29 CFR Part 516. The Department concluded that, in virtually all situations, the records required by the FLSA would include those listed under the H–B Final Rule.

In the October 1995 NPRM, the Department proposed to require employers to retain records of hours worked for all employees in the same specific employment as the H–B worker if (1) the employee is not paid on a salary basis, (2) the actual wage is expressed as an hourly rate, or (3) with respect to H–1B workers only, the prevailing wage is expressed as an hourly rate. Thus unlike the rule currently in effect (or the final rule enjoined in NAM), where the actual wage is expressed as a salary but the prevailing wage is expressed as an hourly wage, hourly records would not be required for U.S. workers in the specific employment question.

The January 1999 NPRM was identical to the October 1995 proposed rule, as described above.

The Department received one comment on the proposed modification of the documentation requirements in response to the 1995 NPRM and five additional comments in response to the 1999 NPRM.

A law firm (Moon) (1995 comment) commended the Department for ''revising the recordkeeping requirement to release employers from any obligation to keep records of hours worked by FLSA-exempt [U.S.] employees.'' At the same time, it criticized the proposal insofar as it requires records to be kept for FLSA-exempt H–1B workers where the prevailing wage is expressed as an hourly rate—a requirement it characterized as artificial and inconsistent with traditional FLSA principles. The firm recommended that the Department instead require SESAs to issue prevailing wage determinations on a salaried basis for exempt workers.

Intel asserted that all of its H–1B workers are paid on a salary basis (and apparently are listed as such on their LCAs); Intel noted, however, that SESAs sometimes issue rates on an hourly basis and suggested that the rule be clarified so that this alone would not trigger a recordkeeping requirement. Intel and ACIP both suggested that the provision should be modified to make plain that such records need be kept only where an employer includes an hourly rate on an LCA. ACIP stated that it should not matter if the SESA lists the rate as an hourly wage. It further argued that if recordkeeping is required in all instances where a SESA issues an hourly rate, this requirement would ''muddy up'' the FLSA-status of the workers. Another commenter (Rubin) expressed similar concerns, stating that considerable paperwork will be generated if recordkeeping is triggered simply because a SESA, without regard to the practice within a profession, issues a rate as an hourly wage.

The Department appreciates the concern expressed by commenters that SESAs sometimes issue hourly rates for certain occupations without regard to whether workers are commonly paid on a salary basis or the FLSA-exempt nature of the job. The Department notes that while SESAs ordinarily base prevailing wage determinations on the U.S. Bureau of Labor Statistics, Occupational Employment Statistics survey (OES), which are generally expressed as an hourly wage, the SESAs will issue the prevailing wage as a salary rate upon request. In addition, to alleviate the concerns of employers and to avoid confusion with regard to the nature of the prevailing wage or recordkeeping obligations, the Department is modifying § 655.731(a)(2) to expressly authorize the employer to convert the prevailing wage determination into the form which accurately reflects the wage which it will pay (*i.e.,* where the prevailing wage is expressed as an annual ''salary,'' it may be converted to an hourly rate by dividing the amount by 2080; where the prevailing wage is expressed as an hourly rate, it may be converted to a salary by multiplying the amount by 2080). The modified regulation instructs that the employer shall state the prevailing wage on the LCA in the manner in which the wage will be paid, *i.e.,* as an hourly rate or a salary. However, the prevailing wage must be expressed as an hourly wage if the worker is part-time, in order to ensure that the part-time worker is in fact paid for the proportion of the week in which he or she actually works.

In addition, after review, the Department has concluded that a further revision of the regulation is appropriate to remove the requirement that an employer keep hourly wage records for its full-time H–1B employees paid on a salary basis. (Employers are also directed to § 655.731(a)(4) (not revised in this rule), which explains payment of wages to employees paid on a salary basis.) The regulation continues to require employers to keep hours worked records for part-time employees, as well as hourly employees. It is the Department's view that there is no other way to ensure that employers comply with their obligation to pay these workers at least the prevailing wage for all hours worked. Otherwise, for example, an employer would be able to state on its H–1B petition that an employee will be paid 20 hours per week, pay the employee an annual salary based on 20 hours per week, keep no record of hours worked, and actually

work the employee 30 hours a week. In any event, the Department believes that most employers keep hours worked records for their part-time employees.

Another commenter (Latour) agreed that it was reasonable for DOL to require the retention of the records enumerated in the proposal, which it stated were records kept by typical employers. However, it expressed concern over a perceived requirement that all the documentation must be included in the public access file. Another commenter (Baumann) expressed concern over the requirement that the records be kept beginning with the date the LCA is submitted throughout the period of employment. This commenter stated that the proposal, read in the broadest sense, requires an employer to continue to update the public access file each time a new worker is hired or a current employee receives a pay increase. He requested the Department to make clear that the wage information relating to non-H–1B workers is limited to the period before the filing of the LCA.

It appears that these commenters have misunderstood the documentation requirement as it relates to the public access file. The basic payroll information required to be maintained does not need to be included in the public access file, but rather must be available to the Wage and Hour Division in the event of an investigation. As provided in § 655.760(a), the public access file is required to contain only the wage rate to be paid the H–1B workers, an explanation of the employer's actual wage system (discussed in IV.O.3, above), and the documentation used to establish the prevailing wage.

5. What Are the Requirements for Posting of ''Hard Copy'' Notices at Worksite(s) Where H–1B Workers Are Placed? (See IV.F, above)

6. What Are the Time Periods or ''Windows'' Within Which Employers May File LCAs? (§ 655.730(b) and § 655.731(a)(2)(iii)(A)(*1*))

Regulations with respect to the time periods or ''windows'' within which employers may file labor condition applications were first published by the Department as §§ 655.730(b) and 655.731(a)(2)(iii)(A)(*1*) in the December 20, 1994 Final Rule. That rule provides at § 655.730(b) that ''a labor condition application shall be submitted * * * no earlier than six months before the beginning date of the period of intended employment shown on the LCA.'' Section 655.731(a)(2)(iii)(A)(*1*) states that ''[a]n employer who chooses to utilize a SESA prevailing wage determination shall file the labor condition application not more than 90 days after the date of issuance of such SESA wage determination.''

These provisions were challenged in the *NAM* litigation as violative of the notice and comment provision of the APA, 5 U.S.C. 553(b)(3). The district court in *NAM*, however, concluded that §§ 655.730(b) and 655.731(a)(2)(iii)(A)(*1*) ''lie on the procedural side of the spectrum and are exempt from the notice and comment requirement of the APA.'' The court further found that the ''plaintiff has failed to demonstrate that the two time periods are so short that they encroach upon an employer's ability to utilize the H–1B workers, and plaintiff has failed to show that the rules alter any substantive standard by which [the Department] will evaluate LCAs.'' Therefore these rules are currently in effect.

On October 3, 1995, during the pendency of the *NAM* litigation, the Department republished these sections for comment. The 1999 NPRM republished these sections for comment without modification.

Six commenters (Intel, CBSI, Motorola, Moon, AILA, MIT) responded to the republication of these sections in the 1995 Proposed Rule. With respect to the requirement that an LCA be filed within 90 days of issuance of a SESA prevailing wage determination, all six commenters asserted that the requirement would make more work for employers and that it would slow down the LCA process. Two of these commenters (CBSI, MIT) also suggested that the validity period of a SESA determination should be 180 days, and one commenter (Moon) suggested that SESA determinations should carry no expiration date.

Three commenters (AILA, BRI, ITAA) responded to these sections as republished in the 1999 NPRM. ITAA supported the provision permitting employers to file LCAs up to six months before the beginning date of the period of intended employment as shown on the LCA, stating the proposal reflected an ''appropriate balance'' of the Department's and business interests. One commenter (BRI) sought clarification on whether an LCA already certified could be used any time during the validity of the LCA, assuming the prevailing wage was obtained from a source other than a SESA.

AILA objected to the 90-day validity period for the SESA prevailing wage as arbitrary and—because most U.S. employers make annual wage assessments—unrelated to the ''real world wage.'' Therefore, AILA asserted, requesting a prevailing wage from the SESA every 90 days places an undue burden on U.S. employers. AILA recommended that SESA prevailing wages should be valid for a period of one year, based on the observation that SESAs rely on the OES survey—an annual survey—to obtain wage information for purposes of issuing prevailing wage determinations.

The Department has considered the comments offered in response to its proposals regarding the time frames in which LCAs may be filed by employers.

Because there has been no objection to the requirement of § 655.730(b) that an LCA be filed within six months of the beginning date of intended employment, the Department will adopt that regulation as proposed.

With regard to the length of the ''validity period'' of SESA-issued wage determinations—the period during which the determination may be used by an employer to support a visa petition—the Department has concluded that the proposed rule can be modified to accommodate the views of the commenters, while maintaining the crucial principle that prevailing wage determinations should reflect rates which are current and accurate for the locality and the occupational classification. The Interim Final Rule therefore provides that the SESA's issuance of a prevailing wage determination shall include a specification of a validity period, which shall be not less than 90 days and not more than one year from the date of the issuance. The Department will provide guidance to the SESAs with regard to their assignment of validity periods. The Department notes that the Bureau of Labor Statistics' Occupational Employment Statistics (OES) survey and most employer-provided surveys are updated on a regular basis, and the update cycles for such surveys can be readily determined—unlike the update cycle for prevailing wages based on Service Contract Act and Davis-Bacon wage determinations or collective bargaining agreements. The Department anticipates that the validity period will be 90 days where the wage rate is based on SCA, Davis-Bacon, or collective bargaining agreements. The Department anticipates that where the wage rate is based on the OES survey or on a survey provided by the employer and found acceptable by the SESA, the validity period will ordinarily be until the next update, provided it is at least 90 days and no more than one year from the date of issuance. This will reduce the burden of employers and SESAs in filing and responding to wage determinations without any adverse affect on worker wages.

7. How May an Employer Challenge a SESA/ES-Issued Prevailing Wage Determination?
(§ 655.731(a)(2)(iii)(A)(*1*) and (d)(2), § 655.840(c))

H–1B regulations specifically explaining the procedures available to employers to challenge a SESA-issued prevailing wage determination were first published by the Department in the December 1994 Final Rule. That rule provides at §§ 655.731(a)(2)(iii)(A)(*1*), 655.731(d)(2) and 655.840(c) that irrespective of whether the wage determination is obtained by the employer prior to filing the LCA or by the Wage and Hour Division in an enforcement proceeding, employers must assert any challenge to the wage determination under the Employment Service (ES) complaint system at 20 CFR part 658, Subpart E, rather than in an enforcement proceeding before the Office of Administrative Law Judges pursuant to Subpart I of part 655. Furthermore, pursuant to § 655.731(a)(2)(iii)(A)(*1*), an employer which wishes to appeal a SESA-issued wage determination must file the appeal and obtain a final ruling pursuant to the ES complaint system prior to filing any LCA based on that determination. Section 655.731(d)(2) provides that where a prevailing wage determination is obtained by Wage and Hour pursuant to § 655.731(d)(1), an employer must file any appeal within 10 days of receipt of the wage determination; notwithstanding the provisions of §§ 658.420 and 658.426, the appeal is filed directly with ETA, rather than with the SESA.

These provisions of the 1994 Final Rule were challenged in the *NAM* litigation as contrary to the requirements of the APA. The court, in that matter, concluded that these provisions were procedural regulations, exempt from APA notice and comment requirements, and further found that the plaintiffs in that case had failed to demonstrate that an employer's substantive rights had been altered by these provisions. Accordingly, the regulations were not enjoined and remain in effect. During the pendency of that litigation, these provisions were republished for notice and comment in the October 1995 Proposed Rule. The identical provisions were republished for notice and comment in the January 1999 Proposed Rule.

The Department received five comments (AILA, Frost & Jacobs, Moon, Motorola, NAM) in response to the proposals republished in 1995. All commenters opposed the proposed provisions. One commenter (Moon) asserted that the ES system was inadequate because it ''handcuffs the employer by gagging the SESA from revealing information.'' The commenter was alluding to the language in § 655.731(d)(2), which states that neither ETA nor the SESA may divulge any employer wage data which was collected under the promise of confidentiality. Another commenter (Frost & Jacobs) urged that any challenge of a SESA determination be required to be resolved by the ES in a timely manner (recommended 30-day time limit). Motorola was also concerned with the ability of the ES to timely respond to SESA challenges, especially in situations of H–1B visa extensions or changes in status from an F-visa to an H–1B. In these situations, this commenter noted, an employer is forced to accept the challenged wage in order to obtain the LCA so that the application may be filed with the INS in sufficient time to prevent removing an individual from the payroll for lack of work authorization.

In their comments to the 1995 proposals, NAM and AILA contended that allowing challenges to prevailing wage determinations to be made only pursuant to the ES complaint system deprives employers of their procedural due process protections. These organizations commented that a paper appeal to an administrative agency, staffed by paid employees of the very agency which determined the prevailing wage, without any rights to discovery, an examination of the evidence in support of the wage determination, or an express written decision, does not substitute for the right to be heard by an independent ALJ where all of these rights are guaranteed.

The 1999 NPRM republication of the 1995 proposals on this issue sought further comment on these proposals. AILA, the sole commenter on this issue, stated that a poll of its members revealed that the complaint process is rarely used because of failure by either the ES or SESA Prevailing Wage Unit to publicize it. AILA further criticized the complaint system as laborious, complicated and protracted, requiring handling by several different offices of the SESA and ETA. Furthermore, the opportunity for a hearing before a DOL administrative law judge is permitted only at the discretion of the ETA Regional Administrator. AILA stated that without the opportunity for meaningful review of a SESA wage determination by an impartial judicial tribunal, such as in an ALJ hearing, employers feel that a meaningful and fair review might not be possible under the ES complaint system.

The Department continues to be of the view, as stated in the preamble to the December 1994 Final Rule, that ''permitting an employer to operate under a SESA prevailing wage determination and later contesting it in the course of an investigation or enforcement action is contrary to sound public policy; such a delayed disruptive challenge would have a harmful effect on U.S. and H–1B employees, competing employers, and other parties who may have received notice of and/or relied on the prevailing wage at issue.''

Challenges to SESA prevailing wage determinations prior to filing the LCA (as distinguished from challenges to prevailing wage determinations obtained by Wage and Hour) must be made through the ES complaint system by filing a complaint with the SESA. However, it should be clarified that complaints need not be initiated at the ES local office level. The complaint may be filed directly with the organization within the SESA responsible for alien labor certification prevailing wage determinations. This office is usually part of the central state office. Since the implementation of the OES program, SESA local offices are not involved in making or issuing prevailing wage determinations. See ETA's General Administrative Letter 2–98 (October 3, 1997).

Furthermore, although the regulations at § 658.421(h) provide that the offer of a hearing before an administrative law judge is discretionary, it is ETA's policy that where the employer is appealing a wage determination obtained by Wage-Hour pursuant to § 655.731(d), the ETA Regional Administrator will offer a hearing before an Administrative Law Judge in every H–1B case which is not resolved to the employer's satisfaction.

With regard to comments that challenges to a SESA prevailing wage determination should be resolved more expeditiously, the Department believes that allowing employers to initiate a challenge to the a SESA prevailing wage determination at the State rather than the local office level will simplify and reduce the time necessary to resolve those complaints. The regulations governing the ES complaint system provide that if the complaint has not been resolved within 30 working days the State office shall make a written determination. Furthermore, appeals to wage determinations obtained by Wage-Hour are filed directly with the ETA Regional Administrator, thus shortening the process.

As indicated above, one commenter to the 1995 Proposed Rule objected to the provision at § 655.731(d)(2) which

states, in relevant part, that neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality. This regulatory provision prohibiting release of wage information codified a longstanding ETA policy of not releasing such information because release of such information would inhibit employers responding to SESA conducted prevailing wage surveys. Furthermore, since January 1998, SESAs, pursuant to ETA's General Administrative Letter 2–98 (October 3, 1997), have based their prevailing wage determinations on the wage component of the Bureau of Labor Statistics' expanded Occupational Employment Statistics (OES) program. The occupational employment statistics questionnaire used to conduct occupational employment surveys informs potential respondent employers that ''[t]he Bureau of Labor Statistics and the State agency collecting this information will use the information you provide for statistical purposes only and will hold the information in confidence to the full extent permitted by law.'' This statement reflects longstanding BLS policies and practices, as well as longstanding ETA policies and practices, which are essential to obtain the information needed to provide timely and accurate statistics to the public. Accordingly, the Department is leaving unchanged the provision at § 655.731(d)(2) which states that in a challenge to a SESA wage determination ''neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.''

AILA has maintained that one reason that the ES complaint system has not been widely used is that it has not been widely publicized; AILA contends that despite the stated obligation at 20 CFR 658.410(d), not all State agencies have publicized the use of the ES complaint system through the prominent display of an ETA-approved ES complaint system poster in each local office. ETA operating experience indicates that a failure to display an ETA-approved ES complaint system poster in each local office is a rare occurrence. Such a failure would be a basis for a complaint about ES actions or omissions under ES regulations (20 CFR 658.401). Further, the availability of the ES complaint to challenge SESA prevailing wage determinations issued under the H–1B program is clearly set forth in the H–1B regulations.

The Department has concluded that at this time further measures to streamline the complaint process for challenging SESA prevailing wage determinations are not warranted. The basic structure of the current system appears to be adequate in view of the few complaints (about six) concerning SESA wage determinations that have been received and processed since publication of the 1994 Final Rule. On review, however, the Department has concluded that classification determinations, including specifically whether an employee is properly classified as an experienced or inexperienced worker, are properly the subject of ALJ enforcement proceedings pursuant to part 655, subpart I, since a determination of whether an employee has been appropriately classified can best be determined upon a review of the actual duties performed by the employee. Accordingly, §§ 655.731(a)(2)(iii)(A)(*1*) and (*3*), and 655.731(d)(2)(ii), are revised to remove references to determinations by the SESA or the ETA Regional Administrator regarding occupational classification.

P. What Additional Interpretative Regulations Did the Department Propose?

The Department proposed a new Appendix B to the regulations in order to explain the Department's interpretation of several provisions of the regulations which were not themselves open for notice and comment. As the Department stated in the NPRM, these interpretations concerned questions that had arisen in its administration of the program and had been discussed with interest groups. It was the Department's view that because of the interest raised over these questions, its interpretations should be included in the regulations, either as an appendix or as regulatory text. As discussed below, on a number of the issues, the provisions have been removed from Appendix B into the regulations.

1. What Constitutes an H–1B Worker's ''Worksite'' or ''Place of Employment'' for Purposes of the Employer's Obligations Under the Program? (See IV.O.1.b, Above)

2. Under What Circumstances May an H–1B Worker ''Rove'' or ''Float'' From His/Her ''Home Base'' Worksite? (See IV.O.1.c, Above)

3. What H–1B Related Fees and Costs Are Considered To Be an Employer's Business Expenses? (§ 655.731(c)(9)(ii)&(iii), Previously in Proposed Appendix B, Section c)

Section 655.731(c)(7)(iii)(C) of the current regulations excludes from deductions which are authorized to be taken from the required wage those deductions which are a recoupment of the employer's business expenses. Paragraph (c)(9) further explains that where the imposition of the employer's business expense(s) on the H–1B worker has the effect of reducing the employee's wages below the required wage (the prevailing wage or actual wage, whichever is greater), that will be considered an unauthorized deduction from wages. These provisions were not open for notice and comment.

The Department sought comment on proposed Appendix B, which explains its interpretation of the operation of these provisions in the context of the H–1B petition process. The NPRM notes that the filing of an LCA and the filing of an H–1B petition are legal obligations required to be performed by the employer alone (workers are not permitted to file an LCA or an H–1B petition). Therefore the NPRM provides that any costs incurred in the filing of the LCA and the H–1B petition (*e.g.,* prevailing wage survey preparation, attorney fees, INS fees) cannot be shifted to the employee; such costs are the sole responsibility of the employer, even if the worker proposes to pay the fees.

The NPRM further notes that *bona fide* costs incurred in connection with visa functions which are required by law to be performed by the nonimmigrant (*e.g.,* translation fees and other costs relating to visa application and processing for prospective nonimmigrant residing outside of the United States) do not constitute an employer's business expense. The Department stated, however, that it would look behind what appear to be contrived allocations of costs.

The Department received 21 comments on this issue. All of the commenters (a number of whom were attorneys commenting only on this issue) opposed the Department's position in the NPRM. As a general matter, these commenters contended that the question of how fees are allocated between the employer and the H–1B worker is a question which should be decided between the employer and the employee.

Immigration attorneys and their professional association (AILA), as well as Senators Abraham and Graham, argued that the Department is interfering with the H–1B workers' right to counsel. AILA argued that how the H–1B petition is drafted is critical to an employee, since it may affect his or her maintenance of status and ability to stay in the United States. Another attorney (Freedman) stated that attorney representation of the alien has acted as a buffer against employer abuses, that there is no reason to imply that an

attorney representing an employer is more competent or more impartial than an attorney suggested by an alien, and that employers may not be aware of the expertise necessary to file H–1B petitions. This attorney also suggested that the requirement that employers pay attorney fees would intimidate a potential whistleblower.

Many commenters (AILA, ACIP, and a number of attorneys, businesses and trade associations) argued, in effect, that since Congress, in drafting the ACWIA, specifically prohibited employers from imposing the additional petition fee on employees, the failure to prohibit the payment of other expenses by employees evidences an intention to allow their imposition by an employer.

ITAA and ACIP argued that the current law is directed toward prohibiting certain deductions from an employee's salary that will push it below the required wage rate. In other words, as long as the H–1B worker receives at least the required wage, it should not be a violation if the worker then spends that money for job-related matters such as fees. ACIP and ITAA stated that as a minimum, if the H–1B worker's wages minus the expenses equals or exceeds the required wage rate, there should be no violation. Latour agreed with the Department that if an H–1B worker's wage is below the prevailing wage, it would be a violation to deduct attorney fees from the worker's compensation, but stated that there is no basis for prohibiting the employer from having the employee handle the payment if the fees, when subtracted from the worker's pay, would not result in compensation less than the prevailing wage.

BRI pointed out that many employers provide payment of immigration expenses as a benefit to employees. Making it mandatory that all employers pay such fees will disadvantage those employers who offer payment of fees as a benefit. BRI also suggested that employer payment of fees would make H–1B workers more likely to take advantage of the system.

ACIP, AILA, and ITAA asserted that an employer should be able to collect these expenses as liquidated damages if the H–1B nonimmigrant prematurely terminates an employment contract. One attorney (Freedman) contended that by listing attorney fees as an employer business expense, the Department was establishing a regulatory basis for repayment as liquidated damages—thereby promoting the abusive actions for which the ACWIA was enacted.

Educational and research institutions (ACE, AIRI, University of California, Johns Hopkins) noted that the INS has determined that because ACWIA has allowed an exemption from the additional fee for H–1B petitions from higher education institutions, affiliated or related research institutions, and nonprofit and governmental research organizations, these institutions are also exempt from the requirement that employers pay the $110 filing fee. Thus, they stated that INS has determined that H–1B workers may pay the cost of the filing fee, as in the past. These commenters therefore urged that DOL accept this approach so there is no conflict between Federal agencies. The University of California also stated that an employer does not have an interest in a worker being in the United States prior to commencement of employment and therefore should not bear the cost of a change of status. Finally, three attorney commenters (Latour, Quan, and Stump) argued that forbidding legal fee payment by nonimmigrant workers will be especially onerous to small businesses, small private schools, and other financially-limited groups which are not familiar with the requirements of the H–1B program.

At the outset, the Department wants to clarify an apparent misconception by some commenters regarding the restrictions placed upon employers in assessing the employer's own business expenses to H–1B workers. An H–1B employer is prohibited from imposing its business expenses on the H–1B worker—including attorney fees and other expenses associated with the filing of an LCA and H–1B petition—only to the extent that the assessment would reduce the H–1B worker's pay below the required wage, *i.e.,* the higher of the prevailing wage and the actual wage.

''Actual wage'' is explained at § 655.731(a)(1) of the existing regulations as ''the wage rate paid by the employer to all other individuals with the similar experience and qualifications for the specific employment in question.'' The regulation continues by noting that ''[w]here no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H–1B nonimmigrant by the employer.''

The Department also wishes to emphasize, as provided in § 655.731(c)(9) of the existing regulations (renumbered in the Interim Final Rule as § 655.731(c)(12)), that where a worker is required to pay an expense, it is in effect a deduction in wages which is prohibited if it has the effect of reducing an employee's pay (after subtracting the amount of the expense) below the required wage (*i.e.,* the higher of the actual wage or the prevailing wage). An employer cannot avoid its wage requirements by paying an employee a check at the required wage and then accepting a prohibited payment from a worker either directly, or indirectly through the worker's payment of an expense which is the employer's responsibility.

The Interim Final Rule continues to provide that any expenses directly related to the filing of the LCA and the H–1B petition are a business expense that may not be paid by the H–1B worker if such payment would reduce his or her wage below the required wage. These expenses are the responsibility of the employer regardless of whether the INS filing is to bring an H–1B nonimmigrant into the United States, or to amend, change, or extend an H–1B nonimmigrant's status. As stated in the NPRM, the LCA application and H–1B petition, by law, may only be filed by the H–1B employer. The employer is not required to seek legal representation in completing and filing an LCA or H–1B petition, but once it utilizes the services of an attorney for this purpose, it has incurred an expense associated with the preparation of documents for which it has legal responsibility.

H–1B nonimmigrants are permitted to pay the expenses of functions which by law are required to be performed by the nonimmigrant, such as translation fees and other costs related to the visa application and processing. The Department also recognizes that there may be situations where an H–1B worker receives legal advice that is personal to the worker. Thus, we did not intend to imply that an H–1B worker may never hire an attorney in connection with his or her employment in the United States. While the illustrative expenses (translation fees and other costs relating to the visa application) were not denominated in the NPRM as legal expenses, if they were provided through an attorney these costs and associated attorney fees would be personal to the worker and may be paid by the worker, rather than expenses that would have to borne by the employer. Similarly, any costs associated with the H–1B worker's receipt of legal services he or she contracts to receive relative to obtaining visas for the worker's family, and the various legal obligations of the worker under the laws of the U.S. and the country of origin that might arise in connection with residence and employment in the U.S., are not ordinarily the employer's business expenses. As such, they appropriately may be borne by the worker.

An employer, however, may not seek to pass its legal costs associated with the

LCA and H–1B petition on to the employee. With respect to the concerns regarding small employers who may not have familiarity with H–1B requirements and may not know an attorney specializing in this area of law, there is nothing to prohibit an H–1B worker from recommending to the employer an attorney familiar with the requirements of the H–1B program. In addition, if an applicant for a job hired an attorney clearly to serve the employee's interest, to negotiate the terms of the worker's employment contract, to provide information necessary for the H–1B petition or review its terms on the worker's behalf, or to provide the applicant with advice in connection with application of U.S. employment laws, including the various employee protection provisions of the H–1B program and its new whistleblower provisions, the fees for such attorney services are not the employer's business expense. In its enforcement, the Department will look behind any situation where it appears that an employee is absorbing an employer's business expenses in the guise of the employee paying his or her own legitimate fees and expenses.

Contrary to the view of many commenters, the Department does not read the ACWIA's proscription against an employer's assessment of the additional petition filing fee on the H–1B worker as evincing an intention that an employer may assess any other expenses against the worker. Neither the language of this provision, nor its place within the statute's larger context, allows a conclusion that Congress intended this provision to affect the ability of an employer to assess other costs to H–1B workers. The ACWIA prohibition against charging the H–1B worker for the filing fee is much more sweeping than the regulatory provision at issue. The ACWIA prohibits an employer from charging the fee, even where there would not be a resulting wage violation, and even as a part of the liquidated damages an employer may contract with a worker to pay for early termination.

The Department concurs with the comments that the ACWIA does not preclude the recovery of expenses in connection with the filing of the LCA and H–1B petition as liquidated damages. It is the Department's view that there is no basis for distinguishing attorney fees and other expenses in connection with these filings from other expenses which may be permitted, under state law, as liquidated damages. However, as set forth in IV.K, above, the Interim Final Rule provides that the $500/$1,000 filing fee may not be collected through liquidated damages.

As stated above, education and research groups stated that INS has taken the position that qualified education and research organizations who are exempt from paying the additional filing fee will not be required to pay the separate $110 petition filing fee themselves, but rather INS will accept payment made by the H–1B workers. The Department does not believe that this statement is inconsistent with its position, since, as discussed above, employers are not prohibited from requiring workers to make these payments where the workers are paid above the required wage. To the extent these commenters may be suggesting that the Department should create an exception for academic and research institutions, the Department sees no basis for this suggestion. The status of these institutions as exempt from the additional filing fee does not change the fact that they are employers who, as such, are required to file the LCA and the H–1B petition, and to pay the attendant costs if payment by the H–1B worker would bring the worker's wages below the required wage.

In the Interim Final Rule, the discussion of expenses of the H–1B program which the employer may not impose on H–1B workers has been removed from Appendix B and incorporated in the regulations at § 655.731(c)(9)(ii) and (iii).

4. When Is the Service Contract Act Wage Rate Required To Be Applied as the ''Prevailing Wage''? (§ 655.731(a)(2)(i)(B), Previously Set Forth in Proposed Appendix B, Section d)

Under § 655.731(a)(2)(i) and (iii)(A) of the regulations, if there is an applicable wage determination issued under the McNamara-O'Hara Service Contract Act (SCA) for the occupational classification in the area of employment, that SCA wage determination is considered by the Department to constitute the prevailing wage for that occupation in that area. This use of the SCA wage determination applies regardless of whether the employer is an SCA contractor, and regardless of whether the workers will be employed on an SCA contract. In the NPRM, the Department addressed questions that have arisen concerning application of the SCA wage rate for computer occupations where the wage rate on the wage determination is $27.63, and application of the SCA wage rate where the employer is of the view that the workers are exempt from the SCA.

The NPRM provided at Appendix B, section d, that where an SCA wage determination for an occupational classification in the computer industry states a rate of $27.63, that rate will not be issued by the SESA and may not be used by the employer as the prevailing wage. That rate does not constitute a statement of the prevailing wage; it is the highest wage that any worker in a skilled computer occupation is required to be paid under the SCA. Under that statute, workers are exempt from the Act's requirements if they earn more than $27.63 per hour, regardless of whether they are paid on a salary basis an hourly rate. (See 29 CFR 4.156; 541.3). In such a case, the SESA will use the OES survey—rather than the SCA rate—and the employer, if it chooses not to obtain a prevailing wage rate from the SESA, will need to consult the OES survey or another source for wage information.

Proposed Appendix B also provided that the question of whether the nonimmigrant worker(s) who will be employed will be exempt or non-exempt from the SCA is irrelevant to use of the SCA wage determination to access the prevailing wage. Therefore, in issuing the SCA wage rate as the prevailing wage determination, the SESA will not consider questions of employee exemption, and, in an enforcement action, the Department will consider the SCA wage rate to be the prevailing wage without regard to whether any particular H–1B employee(s) would be exempt from the SCA if employed under an SCA contract.

The Department received six comments on this issue. ACIP expressed confusion over the Department's singling out the SCA wage rate for computer operations, and urged reconsideration of this position before issuing interim final regulations. AILA stated that the Department's proposal is inconsistent because of this singling out of the SCA rate for computer operations, and contended, along with two other commenters (Rubin & Dornbaum, Cowan & Miller), that by designating the SCA wage as the prevailing wage, the Department virtually requires employers to use SESA determinations instead of the other wage sources permitted by law. Finally, AILA questioned the proposal to disregard the exempt status of the H–1B workers, contending that this is inconsistent with the practice used in the Permanent Program, as recognized in the Technical Assistance Guide at page 114. Network Appliance and FHCRC objected to application of the SCA wage rate where the employer is not subject to that Act.

The significant role in the regulations of SCA determinations of the prevailing wage is founded in the legislative history of the H–1B program in IMMACT 90, which evidences Congressional intent that prevailing wage determinations be made as in the Permanent Alien Labor Certification (immigrant worker) Program, 20 CFR 656.40. See Conf. Rep. No. 101–955, 101st Cong., 2d Sess. 122 (1990), 1990 U.S.C.C.A.N. 6787. In any event, the general provisions governing use of wage rates in SCA wage determinations set forth in the regulations at § 655.731(a)(2)(i) and (iii)(A) were not published for comment. Proposed Appendix B, section d, addressed only two specific questions: application of the SCA wage rate to skilled workers in computer occupations, and the broader question of the relevance of whether workers would be exempt from the SCA.

The Department continues to be of the view that SCA wage determinations cannot properly be used for computer occupations where the wage is stated as $27.63 per hour. As explained above, this wage rate is not in any sense a statement of the prevailing wage for the occupation. Rather, this rate is instead a ''cap'' on the SCA-required wage that results from an SCA statutory provision which has no application in the H–1B program. Allowing the use of the $27.63 rate as the prevailing wage would therefore undermine the statutory requirement that workers be paid at least the prevailing wage, and create an economic incentive to utilize H–1B workers rather than U.S. workers. Furthermore, computer occupations are treated differently than other occupations with regard to the use of SCA rates because these occupations are treated uniquely under the SCA. Only for skilled computer occupations is there a cap on the wage set under the SCA, by virtue of a Congressional enactment exempting workers who are paid more than $27.63 per hour from the Fair Labor Standards Act, and therefore from the SCA. See 41 U.S.C. 357(b); Pub. L. 101–583, § 2, Nov. 15, 1990, 104 Stat. 2871, as amended by Pub. L. 104–188, 110 Stat. 1929.

For several reasons, the Department also continues to be of the view that the potential SCA-exempt status of the nonimmigrant workers who will be employed under the LCA is irrelevant. SCA wage determinations (with the exception of computer professionals, as discussed above) are the Department's statement of the prevailing wage of the occupations listed, and are made without regard to the exempt status of workers surveyed. Furthermore, exemption status cannot be determined in advance, based on an employee's occupation. Rather, determinations are made only on examination of the actual duties performed by individual employees and on an examination of the manner in which the employees are paid. With the exception of computer professionals, doctors and attorneys, SCA-exempt employees must be paid either on a salary or fee basis. See 29 CFR part 541. The Department notes that this interpretation is not in fact inconsistent with the provisions of the Permanent Program's Technical Assistance Guide, which requires use of the SCA wage determination ''[i]f the job opportunity is in an occupation and a geographic area for which DOL has made a wage determination'' under the SCA. Page 114 of the Guide simply points out that executive, administrative, and professional employees are exempt from the SCA, but does not state that the exemption is intended to limit the application of the SCA wage determination in determining the prevailing wage under the permanent program. In any event, it is the Department's intention to conform its prevailing wage determinations under the Permanent Program to the interpretations in this Rule, as set forth in § 655.731(a)(2)(i)(B) (rather than in Appendix B, as proposed).

5. How Are the ''PMSA'' and ''CMSA'' Concepts Applied? (§ 655.715, Previously in Proposed Appendix B, Section e)

The regulations at § 655.731(a)(2) require that the prevailing wage be determined for the occupational classification in the area of intended employment. ''Area of intended employment'' in turn is defined to include ''the area within normal commuting distance'' of the place where the H–1B worker will be employed. This definition further provides that ''[i]f the place of employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of employment.''

Proposed Appendix B, section e, further explained that in computing prevailing wages for an ''area of intended employment,'' the Department will consider all locations within either an MSA or a primary metropolitan statistical area (PMSA) to constitute ''normal commuting distance.'' The NPRM further stated that ''a consolidated metropolitan statistical area (CMSA) will not be used in this manner in determining the prevailing wage rates.'' The Department sought to explain, parenthetically, that this simply meant that all locations within a CMSA will not necessarily be deemed to be within normal commuting distance. The Department determined, based on its operational experience, that CMSAs can be too geographically broad to be used in this manner. Because the Department has not adopted any rigid measure of distance as a ''normal commuting area,'' locations near the boundaries of MSAs and PMSAs, and locations within or near the boundaries of CMSAs may be within normal commuting distance, depending on the factual circumstances.

The Department received four comments (ACIP, AILA, Intel, Latour) on this issue. ACIP believes that there is no justification for eliminating the use of CMSAs for prevailing wage purposes, and that requiring the use of PMSAs and MSAs will unnecessarily inflate the prevailing wage rate for employers located in certain metropolitan areas. That organization further commented that the fact that many wage surveys use CMSAs supports their contention that workers do in fact commute within these regions and CMSAs should continue to be a valid statistical area.

AILA expressed its agreement that employers should make good faith efforts to utilize surveys which fit a geographical area, but noted that it is not always possible. Thus, it recommended that employers be able to use broader geographic surveys where no valid local surveys can be found. Intel expressed a similar view. Latour stated that it has used ''normal commuting distance'' since IMMACT 90, and the Department's proposal would only create confusion for employers.

These comments demonstrate a misunderstanding on the part of the commenters of the Department's view on the use of CMSAs. The Department did not intend to place a blanket prohibition on the use of CMSAs. Rather, the Department intended only to clarify, albeit parenthetically, that, unlike MSAs and PMSAs, locations within a CMSA are not automatically deemed to be within normal commuting distance. If an employer can show that it could not get an adequate sample at the MSA or PMSA level, a survey based upon a CMSA may, in fact, be appropriate. In such a situation, the employer should demonstrate that it was not possible to obtain a representative sample of similarly employed workers within the MSA or PMSA. Upon such a showing, the CMSA survey should be acceptable. Furthermore, if an employer is unable to obtain a representative sample at the MSA or PMSA level, GAL 2–98 (ETA's prevailing wage policy directive)

specifically directs that the geographic base of the survey should be expanded. The Department's proposals on this issue also sought to introduce the PMSA concept into the regulation, which had previously discussed only MSAs. The Department has therefore amended the definition of ''Area of intended employment'' in § 655.715, consistent with this discussion, and has removed the discussion from proposed Appendix B, section e.

6. How Does the ''Weighted Average'' Apply in the Determination of the Prevailing Wage, and What Other Issues Have Arisen Concerning the Determination of the Prevailing Wage? (§ 655.731(b)(3)(iii)(B)(*1*), Previously in Proposed Appendix B, Section f; § 655.731(a)(2)(vii); and Proposed Revisions to § 655.731(a)(2)(iii) and (d)(4))

Proposed Appendix B, section f, explained that, due to the inadvertent omission of the word ''weighted'' from one provision of the regulation, there had been a suggestion of confusion regarding whether an employer which uses an ''independent authoritative source'' to determine prevailing wages was required to use a ''weighted average'' methodology. Therefore proposed Appendix B described this methodology and how and when it is to be used.

The Department received no comments on this provision. The Department has amended § 655.731(b)(3)(iii)(B)(*1*) to expressly require a weighted average and has removed this section from Appendix B.

As discussed above in IV.O.4, the Department has concluded that an employer will not be required to keep hourly wage records for full-time H–1B workers paid on a salary basis where the prevailing wage is expressed as an hourly wage. In order to permit this change in the recordkeeping provisions, it is necessary that the regulations be amended to explain that the hourly wage may be converted to a salary. Section 655.731(a)(2)(vii) is therefore amended to provide that an hourly rate may be converted to a weekly salary by multiplying the rate by 40, and may be converted to an annual salary by multiplying by 2080, etc.

7. What is the Effect of a New LCA on the Employer's Prevailing Wage Obligation Under a Pre-Existing LCA? (§ 655.731(a)(4), Previously in Proposed Appendix B, Section g)

The Department, in the 1999 NPRM, acknowledged the possibility of confusion among employers regarding the prevailing wage obligation of an employer which has filed more than one LCA for the same occupational classification in the same area of employment. In such circumstances, the Department observed, the employer could have H–1B employees in the same occupational classification in the same area of employment brought into the United States (or accorded H–1B status) based on petitions approved pursuant to different LCAs (filed at different times) with different prevailing wage determinations. Therefore, the Department advised in proposed Appendix B to Subpart H, that the prevailing wage rate as to any particular H–1B nonimmigrant is prescribed by the LCA which supports that nonimmigrant's H–1B petition. The regulations require that the employer obtain the prevailing wage at the time that the LCA is filed (§ 655.731(a)(2)). The LCA is valid for the period certified by ETA, and the employer must satisfy all the LCA's requirements for as long as any H–1B nonimmigrants are employed pursuant to that LCA (§ 655.750). Where new nonimmigrants are employed pursuant to a new LCA, that new LCA prescribes the employer's obligations as to those new nonimmigrants. The prevailing wage determination on the later/subsequent LCA does not ''relate back'' to operate as an ''update'' of the prevailing wage for the previously-filed LCA for the same occupational classification in the same area of employment. The Department also cautioned employers that every H–1B worker is to be paid in accordance with the employer's actual wage system (regardless of any difference among prevailing wage rates under various LCAs), and thus is to receive any pay increases which that system provides (*e.g.,* merit increases; cost of living increases).

One commenter, AILA, welcomed the acknowledgment that a prevailing wage on an LCA is not changed by later prevailing wage determinations. However, AILA expressed opposition to the reminder that an employer is obligated to pay any wage increases provided by its actual wage system.

The Department has removed its discussion of this issue from Appendix B to the regulations at § 655.731(a)(4). The issue of payment of wage increases under the actual wage system is discussed above in IV.O.3 of the preamble.

Q. Miscellaneous Matters

The Department has also made minor changes to the regulations not discussed above.

Section 655.700(c)(2) has been amended to explain the effect of the ACWIA amendments upon the entry and employment of a nonimmigrant who is a citizen of Mexico pursuant to the provisions of the North American Free Trade Agreement (NAFTA). As a general matter, the H–1B requirements continue to apply. To avoid the imposition of more stringent requirements on the entry of such nonimmigrants (who are classified as ''TN''), however, neither the recruitment nor the displacement provisions apply to these nonimmigrants. The Interim Final Rule also continues the practice of applying the statutory and regulatory provisions for registered nurses (most recently the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106–95) to TNs.

In addition, several places (*e.g.,* §§ 655.700, 655.705, 655.715), have been revised to reflect the amendments made by the ACWIA and the October 2000 Amendments, and to reflect the current Departmental organizational structure.

V. Executive Order 12866

Because of its importance to the public and to the Administration's priorities, the Department is treating this rule as a ''significant regulatory action'' within the meaning of section 3(f)(4) of Executive Order (E.O.) 12866. E.O. 12866 requires a full economic impact analysis only for ''economically significant'' rules as defined in section 3(f)(1). An ''economically significant'' rule pursuant to section 3(f)(1) is one that may ''have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.''

As noted in the NPRM, the H–1B visa program is a voluntary program that allows employers to temporarily secure and employ nonimmigrants admitted under H–1B visas to fill specialized jobs not filled by U.S. workers. In order to protect U.S. workers' wages and eliminate any economic incentive or advantage in hiring temporary foreign workers, Section 212(n) of the INA imposes various requirements on employers, including the requirement that the employer pay an H–1B worker the higher of the actual wage or the prevailing wage. This Interim Final Rule implements statutory changes in the H–1B visa program enacted by the ACWIA. The ACWIA (1) temporarily increases the maximum number of H–1B visas permitted each year; (2) temporarily requires, during the increased H–1B cap period, new non-displacement (layoff) and recruitment attestations by ''H–1B-

dependent'' employers and employers found to have committed willful violations or misrepresentations; (3) requires employers of H–1B workers to offer the same fringe benefits to H–1B workers as they offer U.S. workers; (4) requires employers in certain cases to pay H–1B workers in a non-productive status; and (5) provides whistleblower protections to employees (including former employees and applicants) who disclose information about potential violations or cooperate in an investigation or proceeding. In addition, this Rule contains final rules on certain proposals previously published for comment in October 1995, and on proposals relating to the Department's interpretations of the INA and its existing regulations.

The Department, in the NPRM, concluded that this rule is not ''economically significant'' because the direct, incremental costs that an employer would incur because of this rule, above customary business expenses associated with recruiting qualified job applicants and retaining qualified employees in specialized jobs, are expected to be minimal. Collectively, the changes proposed by this rule will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the Department concluded that this rule is not a ''significant regulatory action'' as defined by section 3(f)(1) of E.O. 12866, and no economic impact analysis is required under section 6(a)(3).

Four commenters (ACIP, AILA, Hammond and TCS) specifically responded to the Department's findings with respect to E.O. 12866. Hammond disagreed with the Department's assessment that a full economic impact analysis is not required. That commenter stated its belief that the direct, incremental costs an employer would incur because of this rule are above the customary and usual business expenses for recruiting qualified job applicants and for retaining qualified employees in specialized jobs. Hammond contended that the rule will impose significant costs that will have an annual effect on the economy of $100 million or more, and will adversely affect the computer industry and its productivity.

All four commenters stated their view that the Department has underestimated the additional burdens and costs to be attributed to the new regulatory provisions on all H–1B employers, and that the economic impact of the rule is not limited to H–1B-dependent employers. AILA urged the Department to provide a more accurate and reasonable estimate of the burden created by its regulatory provisions, using reliable data and computations, before imposing the regulations in final form. In the alternative, and in the absence of data to support a reasonable estimate of the economic impact on H–1B employers, AILA recommended the adoption of regulations that are less burdensome.

For the reasons discussed above and in the preamble of the NPRM, the Department continues to believe that the Interim Final Rule is not an ''economically significant'' regulatory action under E.O. 12866, section 3(f)(1). Furthermore, as described in detail above, the Department has made significant changes in several provisions which will lessen the perceived burden to employers. Accordingly, the Rule does not require an assessment of costs and benefits under section 6(a)(3) of that E.O. The Rule, however, was treated as a ''significant regulatory action'' under E.O. 12866, section 3(f)(4), because of its importance to the public and to the Administration's priorities and was, therefore, reviewed by the Office of Management and Budget.

VI. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, describing the anticipated impact of the proposed rule on small entities. This initial analysis was published as part of the NPRM. The initial regulatory flexibility analysis concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The Regulatory Flexibility Act also requires agencies to prepare a final regulatory analysis, assessing comments received on the initial analysis, describing any significant alternatives affecting small entities that were considered in arriving at the final rule, and the anticipated impact of the rule on small entities.

In the initial regulatory flexibility analysis, the Department noted that available data and analyses indicated that most of the businesses in the industries in which H–1B workers likely would be employed would meet SBA's definition of ''small.'' The Department, however, stated its conclusion that the economic impact of the rule would not be significant. As there explained, most of the new compliance obligations addressed in this rulemaking apply to only a small subset of the full universe of employers that participate in the H–1B program, namely, those that meet the new definition of ''H–1B dependent employer'' and those found to have committed willful violations or misrepresentations (''willful violators''), which the Department estimated to be no more than 200 employers.

Upon further analysis, including review of the comments received by the Department, we have concluded that the Department's initial assessment was correct, *i.e.,* the rules will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

The discussion which follows addresses the statutory requirements bearing on this final analysis. While much of the discussion closely tracks the language in the Department's initial analysis, we address below the comments received bearing upon the impact of the rule on small entities. The reader should review the supplementary information section of the preamble (particularly section IV) for a full discussion of the various alternatives considered by the Department in crafting the IFR. However, we discuss below some aspects of these alternatives as they relate to small entities.

1. What Are the Objectives of, and the Legal Basis for, the Interim Final Rule?

On October 21, 1998, President Clinton signed into law the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), which was enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999 (Public Law 105–277). The ACWIA amended the Immigration and Nationality Act (INA), as amended (8 U.S.C. 1101 *et seq.*), relating to the H–1B visa program. Under the H–1B visa program, employers may temporarily employ nonimmigrants admitted into the U.S. under H–1B visas in specialty occupations and as fashion models, instead of employing U.S. workers, under certain conditions. Section 412(d) of the ACWIA provides that some of the amendments made by the ACWIA do not take effect until the Department promulgates implementing regulations, which are the subject of this rulemaking.

The Interim Final Rule is issued pursuant to provisions of the INA, as amended, and the ACWIA, 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8

U.S.C. 1182 note); and sec. 412(d) and (e), Pub. L. 105–277, 112 Stat. 2681. The objectives of the rule are to enable employers to understand and comply with applicable requirements under the amended H–1B visa program, and to advise employees and applicants of the protections afforded by the amendments to U.S. and H–1B workers.

2. What Comments Were Received Addressing the Initial Regulatory Flexibility Analysis, How Does the Department Assess the Comments, and What Changes, if Any, Were Made as a Result of the Comments?

As discussed below, the Department received only a few comments (from ACIP, AILA, Hammond and ITAA) that specifically discussed the initial regulatory flexibility analysis. The comments specifically directed at the initial regulatory flexibility analysis addressed only the commenters' disagreement with the Department's estimate of the number of U.S. employers that would be affected by the rule's requirements pertaining to H–1B–dependent employers or willful violators. Employers with such status (generally those employers with more than 15 percent of their workforce comprised of nonimmigrants or employers found to have willfully violated H–1B requirements) must follow requirements not imposed on the much larger number of employers that employ a smaller percentage of nonimmigrant workers. Since the comments received specifically relate to the Department's estimate regarding the number of small entities affected by the IFR, the comments are discussed in the next section of this analysis.

Although not raised in connection with the initial analysis, numerous commenters, as detailed in the preceding sections of the preamble to the Interim Final Rule, objected to the recordkeeping burdens imposed by the rule; a few commenters (Chamber of Commerce, IEEE, Simmons) expressed a general concern that the regulations would impose requirements that small businesses would find burdensome. (See sections IV.D.7, D.8, E.1.)

The Department has taken these comments into account, clarifying the particular requirements in several respects. While many of these comments did not differentiate among employers by size, the Department has made many adjustments in the Interim Final Rule, as discussed above, that will benefit small employers. The comments reflected some misunderstanding regarding the need to create, as distinguished from retaining or maintaining, documents relating to the H–1B employment process. The Rule requires the creation of documents in only a relatively few instances. And, in most instances, the maintenance of these documents already is required by other statutes and regulations. For example, while the regulation requires employers in some instances to maintain basic payroll and hours worked records for certain employees, employers are already required to do so by other federal statutes, such as the Fair Labor Standards Act. In a related matter, the Interim Final Rule clarifies that employers need not segregate H–1B documents in a file or system separate from other employment documents. Finally, the Rule, at § 655.760, clarifies the documents that need to be kept in a public access file and simplifies the employer's obligations in this regard. These aspects of the Rule are discussed in full in the earlier sections of the preamble. The reader's particular attention to the following points is recommended: The Paperwork Reduction Act summary in section I; non-displacement documentation (IV.D.8); recruitment practices (IV.E.2); recruitment documentation (IV.E.5); benefits documentation (IV.G.2); location of documents (IV.D.3); hours worked documentation (IV.O.4); public access rules clarified (IV.O.4 and § 655.760 of the Rule).

The Rule also contains several provisions that will particularly benefit small businesses. The Department has provided: A toll free fax number to file LCAs (see IV.B); free or nominal charge resources for determining ''master's degree equivalence'' (see IV.C.2) and determining ''specialities related to'' a master's degree (see IV.C.3). Other aspects of the Rule that may be of particular assistance to some small entities include the use of a download program that can be used with Apple Macintosh systems (see IV.B.5) and employer options regarding the payment of benefits to H–1B workers already employed abroad by the employer or its affiliate (see IV.G.1). The Department's outreach efforts to explain the requirements of the ACWIA and the Rule also benefit small entities. As part of these efforts, the Department, as discussed in the preamble above, at section IV.B, plans to make available soon its small business compliance guide and to set up a computer program that will enable individuals and employers to obtain answers to their H–1B questions.

The Department received some miscellaneous comments that concern small entities. As noted above, at section IV.N of the preamble, the Department received a comment requesting that state school districts and private schools be included in the special prevailing wage provisions. The Department has concluded that the statute does not allow for such exemption.

One commenter (Gurtu & McGoldrick) expressed the summary view that the rules would impose excessive recordkeeping requirements on small businesses. As noted here and throughout the preamble, we believe that the Interim Final Rule imposes only minimal obligations on employers, and that the ACWIA does not allow the latitude to except small entities from the requirements necessary to ensure compliance with the statute. (See section 8 below.)

Another commenter (SBSC) expressed the view that the Department's use of established definitions and regulations from areas of the law external to immigration would prove costly to small employers. We believe that we have provided ample information to allow all employers to understand and comply with all aspects of the H–1B program. No employer is required to look beyond the regulations in order to meet these obligations. At the same time, the references in the preamble to other statutes should assist employers by providing them with potentially useful guides to help them in meeting these requirements and by reminding them that other laws may bear on the employment of H–1B workers.

3. How Many Small Entities Will Be Covered by the Interim Final Rule?

A. As the Department noted in the initial regulatory flexibility analysis, the rule will have the greatest impact on ''H–1B-dependent'' employers and ''willful violators.'' Other aspects of the rule will apply all to employers which seek to temporarily employ nonimmigrants admitted into the U.S. under the H–1B visa program in specialty occupations and as fashion models. The initial analysis distinguished between ''H–1B dependent employers''/''willful violators'' and all other H–1B employers and we follow that approach here in discussing these two groups of employers.

Section 412 (a)(3) of the ACWIA defines ''H–1B-dependent employer'' as an employer that has 25 or fewer full-time equivalent employees employed in the U.S. and more than 7 H–1B nonimmigrants, at least 26 but not more than 50 full-time equivalent employees and more than 12 H–1B nonimmigrants, or at least 51 full-time equivalent employees and a workforce of H–1B nonimmigrants comprising at least 15

percent of its full-time equivalent employees. The ACWIA requires H–1B-dependent employers and employers found to have willfully violated H–1B requirements to attest that they will not displace (layoff) U.S. workers and replace them with H–1B workers in essentially equivalent jobs, that they will not place H–1B workers with other employers without first inquiring as to whether they intend to displace U.S. workers, and that they have taken good faith steps to recruit in the United States for U.S. workers to fill the jobs for which they are seeking H–1B workers. An employer filing an LCA pertaining only to ''exempt H–1B nonimmigrants'' need not comply with the non-displacement and good faith recruitment attestations, regardless of status as an H–1B-dependent or willful violator. ''Exempt H–1B nonimmigrants'' are defined as those who earn at least $60,000 annually or who have attained a master's degree or its equivalent in a specialty related to the intended employment.

B. The definition of ''small'' business varies considerably, depending on the policy issues and circumstances under review, the industry being studied, and the measures used. The size standards used by the U.S. Small Business Administration (SBA) to define small business concerns according to their Standard Industrial Classification (SIC) codes are codified at 13 CFR 121.201. SBA's small size standards are generally expressed either in maximum number of employees or annual receipts (in millions of dollars).

As explained in the initial analysis, we could apply SBA's size standards and gauge precisely how many of the affected businesses are ''small'' if we were able to construct a profile of each business that used H–1B workers, showing both the total number of workers employed and the portion that are H–1B workers, together with total annual receipts and the applicable SIC industry code. Unfortunately, the precise data required for this analysis are not available. However, we know that by far the greatest number of occupations in LCAs certified under the H–1B program have historically been for computer-related occupations, and for therapists (principally physical and occupational).[1] Looking just at these categories would present a view of 60 to 70 percent of all the certified job openings under the H–1B program.

For Major Group 73, Business Services, the SBA's small business size standards for SIC codes in which computer-related occupations would likely be employed are all at the $18 million level (annual receipts).[2] Data from the *1992 Census of Service Industries: Establishment and Firm Size* (published February 1995) indicate that 39,511 out of a total 40,242 firms (or 98.18 percent) have annual receipts less than $18 million.

The Business Services category would not include other users of H–1B workers in computer-related occupations, such as computer equipment manufacturers. For computer and other electronic equipment manufacturers, the SBA's small size threshold is 1,000 employees.[3] In 1994 (latest data on size distribution), 1.6 percent of the establishments employed 1,000 or more workers (comprising 42.1 percent of the employment in the industry).[4] There were more than 14,000 establishments in this industry in 1996.

For Major Group 80, Health Services, the SBA's small size threshold for all categories within the group are at the $5 million (annual receipts) level. Data from the *1992 Census of Service Industries: Establishment and Firm Size* (February 1995) indicate that 244,437 out of a total 249,052 firms (or 98.15 percent) have annual receipts less than $5 million.[5]

Based on the above data, we concluded in the initial analysis that the vast majority (over 98 percent) of the businesses in the industries in which H–1B workers are likely to be employed would meet SBA's definition of ''small.'' In the initial analysis, the Department estimated that approximately 50,000 employers a year file LCA's for H–1B nonimmigrants. The Department also estimated that not more than ten (10) employers a year will be found to have committed willful violations. The Department has received no comments, nor possesses any other information, that would call into question this approach or the estimate it yielded in the initial analysis. Based upon its updated review of the number of LCAs filed per year and taking into consideration the increase in petitions permitted by the October 2000 amendments to the INA, the Department currently estimates that 63,500 employers a year will file LCAs.

C. As noted in the initial analysis, there are no data available to determine how many ''H–1B-dependent'' employers will exist under the rule. We arrived at our estimate of the number of ''H–1B-dependent'' employers for purposes of the initial analysis, as follows. Although the test for H–1B dependency varies with the size of the employer, an employer must employ at least seven H–1B workers to be dependent. Therefore, we stated that if we assume that every H–1B-dependent employer had the smallest workforce threshold (25 full-time equivalent employees) and therefore subject to the ''more than seven H–1B'' workers test, we can estimate the maximum potential number of H–1B-dependent employers in computer-related fields and health services (using therapists) by determining how many of those employers submitted LCAs seeking certification of more than seven H–1B nonimmigrants on a single LCA. This approach undercounts the potential number of H–1B-dependent employers because some employers requesting fewer than seven H–1B workers on a single LCA may already employ other H–1B workers or may file more than one LCA. For purposes of the initial analysis, therefore, we calculated the number of employers for which more

[1] Our initial analysis, utilizing 1997 data, showed that 398,324 job openings were certified—44.4 percent in computer-related occupations and 25.9 percent for therapists. More recent data for FY 1999 shows 53.2 percent of 1,089,524 openings certified were in computer-related occupations and 17.7 percent were therapists (of whom 118,350 or 88.27 percent were filed by one employer). For the period October 1, 1999 through May 31, 2000, 514,263 openings were certified—61 percent in computer-related occupations and only 0.5 percent therapists.

[2] Major Group 73 includes the followng SIC industries: Computer Programming Services (7371); Prepackaged Software (7372); Computer Intergrated Systems Design (7373); Computer Processing and Data Preparation and Processing Services (7374); Information Retrieval Services (7375); Computer Facilities Management Services (7376); Computer Rental and Leasing (7377); Computer Maintenance and Repair (7378); and Computer Related Services. Not Elsewhere Classified (N.E.C.) (7379).

[3] According to BLS, the following five SICs comprise the electronic equipment manufacturing industry: 357, Computer and Office Equipment; 365; Household Audio and Video Equipment; 366, Communications Equipment; 367, Electronic Components and Accessories; and 381, Search and Navigation Equipment. These five SICs share common need for high levels of computer programmers, analysts, engineers and other computer scientists. BLS has published data on establishment size for the industry as a whole, but not its five components. See *Career Guide to Industries*, BLS Bulletin 2503, pp. 53–56, January 1998. The products of this industry include computers and computer storage devices such as disk drives; semiconductors (silicon or computer chips or integrated circuits), which are the core of computers and other advanced electronic products; computer peripheral equipment such as printers and scanners; calculating and accounting machines such as automated teller machines; and other electronic equipment using highly skilled computer and other scientists and professionals.

[4] BLS Bulletin 2503 (January 1998). Source: U.S. Department of Commerce. *County Business Patterns*, 1994.

[5] SIC industries 8021 (Offices and Clinics of Dentists), 8042 (Offices and Clinics of Optometrists), 8072 (Dental Laboratories), and 8092 (Kidney Dialysis Centers) were subtracted from the total number of health service firms in SIC 80 for purposes of this analysis, based on the assumption that such firms would not likely employ physical or occupational therapists.

than five (5) H–1B nonimmigrants were certified on a single LCA to work in computer-related fields or as therapists in FY 1997, to estimate an upper-bound limit of the maximum potential number of H–1B-dependent employers. This yielded a total of 1,425 employers (8.7 percent of the total in the sample). This approach for setting the maximum upper limit greatly overstates H–1B dependency, however, because many larger firms employing more than 25 full-time employees would automatically be included in the count of H–1B dependents. For example, we know, that many major employers of H–1B workers have workforces larger than 25 full-time equivalent employees. In addition, some employers file LCAs certifying a need for H–1B workers but for various reasons never fill all the positions.

Both ACIP and AILA asserted that the Department's premises and conclusion were not logically connected and, along with the other two commenters, contended that the Department's estimate is not supported by reliable data. AILA stated that the number of affected employers and the resultant burden ''may be significantly higher than the DOL suggests.'' ACIP and AILA asserted that the Department's estimated ''upper limit'' of 1,425 H–1B dependent employers was based on an unsupported and, in their view, incorrect assumption that employers generally file ''blanket LCAs.'' Hammond recommended that the Department work with the INS to analyze the economic information required in an H–1B petition to determine the probable number of small and H–1B dependent employers that will be affected by the proposed regulations.

As the Department explained in both the initial regulatory analysis and in other sections of the preamble to the NPRM, aside from reasonable estimates, there are no data available to determine precisely how many ''H–1B dependent'' employers will exist under the rule in any given year, nor how many employers will be found to have committed willful violations or misrepresentations. Such precision would require a profile of each business that used H–1B workers, showing both the total number of workers employed and the portion that are H–1B workers, together with total annual receipts and the applicable SIC industry code for each business. Additional data identifying the education and earnings profiles of the H–1B workers would be needed to determine whether H–1B-dependent employers would likely be filing LCAs for only exempt workers. In the course of developing the NPRM, the Department requested available information from the INS and was advised that information required in an H–1B petition would not enable us or the INS to determine the probable number of small or H–1B-dependent employers that would be affected by the proposed regulations. The Department's conclusion that no such data existed was borne out by the lack of any suggestions in the comments that such data exist. Similarly, we received no suggestions for arriving at a better estimate of the number of employers that would be affected by the rule.

After review of the comments and available data, the Department has concluded that there are no data to assist it in determining the likely number of H–1B-dependent employers and willful violators. The Department has received no information that leads it to question its estimate in the initial analysis that the number of H–1B-dependent employers and willful violators who would be subject to the new recruitment and displacement attestations would be between 100 and 200 employers. The Department does not believe that the increase in the cap for H–1B workers will have a proportionate effect on the number of dependent employers, since the Department believes that most such employers are already dependent. To take into account employers that may have been close to H–1B-dependency under the former cap who could now employ a larger number of H–1B workers, the Department now estimates the number of H–1B-dependent employers and willful violators to be 150 to 250 employers, at a midpoint of 200 employers.

4. What Are the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Interim Final Rule, Which Small Entities Will They Affect, and What Type of Professional Skills Are Needed To Meet the Requirements?

The reporting and recordkeeping requirements of the Rule are not overly complex, and in most cases simply require that a copy be kept of a record made for other purposes or that a simple arithmetic calculation be performed. There are no requirements for technical, specialized or professional skills to comply with the reporting or recordkeeping provisions of the rule. The particular reporting and recordkeeping requirements of this Rule are described above in the Supplementary Information section entitled ''Paperwork Reduction Act'' and in various places throughout the preamble. Some of these requirements are also briefly summarized below.

As noted, most new recordkeeping and compliance requirements imposed by the ACWIA and this rule apply only to employers meeting the new definition of ''H–1B-dependent employer'' or employers found to have committed willful violations or misrepresentations, which we estimate to number between 125 and 225. To determine if it meets the new definition of ''H–1B-dependent employer,'' an employer of H–1B workers must compare the number of its H–1B workers to the number of full-time equivalent employees. H–1B-dependent employers and willful violators must comply with the new ''non-displacement'' and ''good faith recruitment'' requirements of the ACWIA. In many cases, it will be readily apparent, at either end of the spectrum, whether an employer is or is not H–1B dependent and no actual computation will be necessary. Based on the comments, the Interim Final Rule provides an easy test for determining if H–1B-dependency status is readily apparent. In the few instances where actual computations will be required, the Rule also provides an easier, alternative method of determining full-time equivalent employees.

The ACWIA provisions on non-displacement and recruitment of U.S. workers do not apply if the LCA is used for petitioning only ''exempt H–1B nonimmigrants.'' If INS determines in the course of adjudicating an H–1B petition that an H–1B nonimmigrant is exempt, the employer must keep a copy of the determination in the public access file.

The Interim Final Rule would require an H–1B-dependent employer or willful violator that is seeking to place an H–1B nonimmigrant with another employer to secure and retain a written assurance from the second employer, a contemporaneous written record of the second employer's verbal statement, or a prohibition in the contract between the two employers, stating that the second employer has not displaced and intends not to displace a U.S. worker.

H–1B-dependent employers and willful violators must maintain documentation that they have not displaced U.S. workers for a period 90 days before and 90 days after the employer petitions for an H–1B worker. The Interim Final Rule, like the proposed rule, requires covered employers to maintain typical personnel records that would ordinarily be readily available, including name, last known mailing address, title and description of job, and any documentation kept on the employee's experience and

qualifications and principal assignments, for all U.S. workers who left employment during the 180-day window. The employer must also keep all documents concerning the departure of any such U.S. employees and the terms of any offers of similar employment made to them and their responses. In most cases no special records need to be created to meet these requirements. EEOC requires under its regulations that any such existing records be maintained by employers.

H–1B-dependent employers and willful violators must make good faith efforts to recruit U.S. workers using procedures that meet industry-wide standards before hiring H–1B workers. These employers will be required to keep documentation of the recruiting methods they used, including the places, dates, and contents of advertisements or postings, and the compensation terms (if not included in contents of advertisements and postings). These employers must also summarize in the public disclosure file the principal recruitment methods used and the time frame within which the recruitment was conducted. As discussed above at section IV.E.5 of the preamble to this Rule, the NPRM requested comments on how employers should determine industry-wide standards, and how to make this determination available to U.S. workers. (See IV.E.1, E.5.) Inasmuch as the requirements are based on industry-wide standards, meeting this statutory standard should not impose significant burdens on affected employers in most cases. To ascertain whether employers have given good faith consideration to U.S. worker/applicants, the Interim Final Rule also requires the retention of applications and related documents, rating forms, job offers, etc. Retention of such records already is required by EEOC, so no additional burden will be imposed. (See IV.D.8, above.)

All employers of H–1B workers must offer fringe benefits to H–1B workers on the same basis and terms as offered to similarly-employed U.S. workers. To document that they have done so, employers must keep copies of their fringe benefit plans and summary plan descriptions, including rules on eligibility and benefits, evidence of what benefits are actually provided to workers, and how costs are shared between employers and employees. Because regulations of the Pension and Welfare Benefits Administration and the Internal Revenue Service generally require employers to keep copies of such fringe benefit information, meeting this requirement should not impose any additional burdens on most affected employers, and in the few cases where such information is not currently retained, it is anticipated that the additional burden will be minor. (See IV.G.1, above.)

As noted in the initial analysis, the Department republished and asked for comment on several provisions of the December 20, 1994 Final Rule (59 FR 65646) that were published for notice and comment on October 31, 1995 (60 FR 55339). As explained above, H–1B workers are required to be paid at least the actual wage or the prevailing wage, whichever is higher. To ensure this requirement is met, employers are required to include in the public access file documents explaining their actual wage system, and to maintain payroll records for the specific employment in question for both their H–1B workers and their U.S. workers. The Interim Final Rule revises the proposal to require that hours worked records be retained with respect to U.S. workers only if the employee is not paid on a salary basis or the actual wage is expressed as an hourly rate, and further that hours worked records be kept for H–1B workers only if the worker is part-time or is not paid on a salary basis. In virtually all cases, these employees would be paid hourly and hourly pay records would therefore be kept. (See IV.O.4, above.)

5. Are There any Federal Rules That Duplicate, Overlap or Conflict With the Interim Final Rule?

There are no Federal rules that directly duplicate, overlap or conflict with the Interim Final Rule. Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*), enforced by the EEOC, prohibits national origin discrimination by employers with 15 or more employees (see 29 CFR part 1606). The Immigration Reform and Control Act of 1986 (see 8 U.S.C. 1324b; 8 U.S.C. 1103(a)), enforced by the U.S. Department of Justice, prohibits national origin discrimination by employers with between four and fourteen employees (those not covered by Title VII), and citizenship-status discrimination by employers with at least four employees (see 28 CFR part 44). In addition, under the ACWIA, an ''H–1B dependent'' employer must attest that it has taken good faith steps to recruit in the U.S. for the position for which it is seeking the H–1B worker, and that it has offered the job to any U.S. worker/applicant who is equally or better qualified. The Department of Labor is responsible for enforcing the required recruitment, and the Department of Justice is responsible for administering an arbitration process detailed in the ACWIA if U.S. worker/applicants complain that they were not offered a job for which they were equally or better qualified, as required.

6. Are There Significant Alternatives Available Such as Differing Compliance or Reporting Requirements or Timetables for Small Entities?

The compliance and reporting requirements of the Interim Final Rule, together with those significant alternatives which have been identified, are discussed in the ''Supplementary Information'' section of the preamble above. Different timetables for implementing the statutory requirements for smaller businesses would not be consistent with the statute. The statute temporarily increases the maximum allowable number of nonimmigrants that may be admitted into the U.S. to perform specialized jobs not filled by U.S. workers, and temporarily adds corresponding provisions intended to protect the wages and working conditions of U.S. workers in similar jobs during the same period.

7. Can Compliance and Reporting Requirements Be Clarified, Consolidated, or Simplified Under the Interim Final Rule for Small Entities?

The compliance and reporting requirements of the Interim Final Rule, and each of the alternatives considered together with their expected advantages and disadvantages, are described in the preamble above. The Department has attempted to keep new recordkeeping requirements to the minimum necessary for the Department to ascertain compliance and for the public to be aware of the primary documentation relied on by the employer to satisfy the statutory requirements. (See Section 212(n)(1) of the INA.) Moreover, most of the recordkeeping requirements already are imposed by other statutes, or only require retention of documents which, in any event, would be kept as a matter of prudent business practice.

Upon further review and consideration if the comments received, the Department has clarified several aspects of the rule. Among other items clarified are the documents to be kept in the public disclosure file and other documents which, in contrast, need not be segregated within the employer's system of records. (See § 655.760.)

In this connection, the Department also considered the use of performance rather than design standards in the regulations. The proposed rules discussed such alternatives, such as establishing a presumption of good faith recruitment based on the employer's hiring a significant number of U.S.

workers and, thereby, accomplishing a significant reduction in the ratio of H–1B workers to U.S. workers in the employer's workforce. (See IV.E.1, E.2, above.) The comments received on these proposals were negative and these alternatives were not included in the Interim Final Rule.

8. Can Small Entities Be Exempted From Coverage of the Rule, or Any Part of the Rule?

Exemption from coverage under this Interim Final Rule for small entities would not be appropriate under the terms of the controlling H–1B statutory mandates. The ACWIA contains no authority for the Department to grant such an exemption except to the extent that the statute itself grants an exemption (*e.g.*, the definition of ''H–1B-dependent employer''). Further, as discussed above, the Department believes that the impact on small businesses will not require significant, additional expenditures. The direct, incremental costs associated with the customary and usual business expenses for recruiting qualified job applicants and retaining qualified employees in specialized jobs should be minimally affected by implementation of this Rule. Most employers, including the smallest entities, should already have systems in place to meet the additional requirements prescribed by the ACWIA and this Rule.

VII. Small Business Regulatory Enforcement Fairness Act

The Department, in the NPRM, concluded that the proposed rule is not a ''major rule'' within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 801 *et seq.*. The rule will not likely result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S. based enterprises to compete with foreign-based enterprises in domestic or export markets.

Five commenters (ACIP, AILA, Hammond, ITAA and SBSC) responded to the Department's conclusion that this rule is not a ''major rule'' within the meaning of SBREFA. The commenters generally focused on their belief that the Department has underestimated the costs to employers of complying with the rule. They asserted that a reasonable, reliable estimate of costs would show that the rule is a major one requiring approval by Congress. ACIP and AILA contended that the Department has underestimated the cost of this rule to employers because it has not included in its analysis the costs to employers for legal services, training materials, computers, files and other systems necessary for compliance.

The Department believes that employer compliance with the additional requirements of the ACWIA will not require significant, additional expenditures as suggested by commenters. The direct, incremental costs associated with the customary and usual business expenses for recruiting qualified job applicants and retaining qualified employees in specialized jobs should be minimally affected by implementation of this rule. Those systems needed for compliance with the few additional requirements of the ACWIA should largely already be in place. The Department has concluded that collectively, the changes set forth in this Rule will not have an economically significant impact, and therefore the Rule is not a major rule under SBREFA.

VIII. Unfunded Mandates Reform Act of 1995; Executive Order 13132

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*) directs agencies to assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector, ''* * * (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' The Department concluded in the NPRM that for purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased annual expenditures in excess of $100 million by State, local or tribal governments in the aggregate, or by the private sector. Moreover, the requirements of the Unfunded Mandates Reform Act do not apply to this Rule because it does not include a ''Federal mandate,'' which is defined to included either a ''Federal intergovernmental mandate'' or a ''Federal private sector mandate.'' 2 U.S.C. 658(6). Except in limited circumstances not applicable here, those terms do not include ''a duty arising from participation in a voluntary program.'' 2 U.S.C. 658(5)(A)(I)(II) and 7(A)(ii). A decision by an employer to obtain an H–1B worker is purely voluntary and the obligations arise ''from participation in a voluntary Federal program.''

AILA specifically took issue with the Department's description of the H–1B program as ''voluntary.'' AILA believes that there is very little that is ''voluntary'' about the H–1B program. Rather, that group asserts, Congress recognized an urgent need for additional qualified professionals in certain fields and responded to that need by enacting ACWIA. AILA describes the H–1B program as a ''government monopoly'' where businesses have no choice but to accept the burdensome requirements of the program if they are to obtain the highly skilled foreign workers necessary for their economic survival. While from an employer's perspective, use of the H–1B visa program may be an economic necessity, participation in the program remains voluntary since it applies only to employers who choose to participate in the program.

In addition, the Rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, within the meaning of Executive Order 13132. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

IX. Catalog of Federal Domestic Assistance Number

This program is listed in the Catalog of Federal Domestic Assistance at 17.252.

List of Subjects in 20 CFR Parts 655 and 656

Administrative practice and procedure, Agriculture, Aliens, Employment, Forest and forest products, Health professions, Immigration, Labor, Longshore work, Migrant labor, Penalties, Reporting requirements, Students, Wages.

The Interim Final Rule

Parts 655 and 656 of Chapter V of Title 20, Code of Federal Regulations, are amended as follows:

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The table of contents for part 655, subparts H and I, is revised to read as follows:

Subpart H—Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models

655.700 What statutory provisions govern the employment of H–1B nonimmigrants and how do employers apply for an H–1B visa?

655.705 What federal agencies are involved in the H–1B program, and what are the